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RULES  
OF  
**FEDERAL PRACTICE:**

CONSISTING OF THE  
**RULES OF THE SUPREME COURT OF THE  
UNITED STATES,**  
AND  
ORDERS OF THE SUPREME COURT IN REFERENCE TO APPEALS FROM  
THE COURT OF CLAIMS;

THE RULES PRESCRIBED BY THE SUPREME COURT  
FOR  
THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES  
IN EQUITY AND IN ADMIRALTY;

TOGETHER WITH  
**THE RULES OF THE COURT OF CLAIMS,**

AS THE SAME RESPECTIVELY EXISTED ON MARCH 1, 1884.

TO WHICH ARE ADDED  
*CROSS-REFERENCES TO THE RULES, NOTES OF COGNATE  
STATUTES, AND REFERENCES TO JUDICIAL DECISIONS.*

EDITED BY  
**EDWARD K. JONES,**  
OF THE NEW YORK BAR.

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## ADVERTISEMENT.

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The obvious utility and importance of the following rules of practice induces me to add to them and publish in this form matter gathered originally and mainly for my own private reference.

Special care has been taken in the faithful rendition of the rules, and in the references to their original authority. It is trusted, also, that the notes of statutes and decisions will be found equally full and accurate.

EDWARD K. JONES.

NEW YORK, *March 20, 1884.*

**F E E S**  
**OF THE CLERK OF THE SUPREME COURT OF THE**  
**UNITED STATES.**

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In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

# RULES OF THE SUPREME COURT OF THE UNITED STATES.

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## RULE I.—*The Clerk.\**

(1.) The clerk of this court shall reside and keep the office, at the seat of the National Government, and he shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

(2.) The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court, except as provided by rule 10.

See Sup. Ct. Rule 10.

First paragraph promulgated Feb. 3, 1790, as original rule 1, 1 Cranch, xv; republished, 1 Wheaton, xv; again republished, 1 Peters v; revised and corrected December Term, 1858, 21 How. v. Second paragraph promulgated August 7, 1790, as original rule 12, 1 Cranch, xvi; republished in 1 Wheaton, xv; again republished 1 Peters, vii; supplemented by original rule 34, promulgated February Term, 1825, 1 Peters, ii; revised, corrected and made part of this rule, December Term, 1858, 21 How. v; amended October Term, 1882, 106 U. S. vii; again amended Jan. 7, 1884.

## Statutory Provisions.

*Rev. Stats. sec. 368.]* The Attorney General shall exercise general supervisory powers over the accounts of the clerks, etc., of the United States courts.

*Rev. Stats. sec. 677.]* The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions.

*Rev. Stats. sec. 678.]* One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the

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\* See schedule of Clerk's fees on opposite page.

clerk, and may be removed at the pleasure of the court.—In case of the death of the clerk, deputy or deputies continue in office and act as clerk in his name until new clerk appointed and qualified.—For default or misfeasances of deputy in clerk's life time or after his death, clerk, estate and sureties liable, and his executor or administrator to have same remedy as clerk if committed in his lifetime.

*Rev. Stats. sec. 679.]* Records, etc., of old Court of Appeals to be kept in office of clerk, and copies furnished upon application, and same to be evidence, etc.

*Rev. Stats. sec. 748.]* Clerk, assistant, or deputy, etc., not to act as solicitor, proctor, attorney, or counsel in any cause in courts of the United States.

*Rev. Stats. sec. 749.]* Violation of preceding section punished by striking from roll of attorneys, on complaint, notice and hearing.

*↳ Rev. Stats. sec. 794.]* Clerk and deputies before entering office to take oath or affirmation. (Form prescribed.)

*Rev. Stats. sec. 795.]* Clerks of all courts to give bond to be fixed and sureties approved by court, conditioned, etc.—New bond may be required.—Bond to be entered on journal and deposited.—Copy of entry to be proof of execution. See Act Feb. 22, 1875, 18 Stat. L., 333.

*Rev. Stats. sec. 798.]* Clerk to present an account of moneys each session of court.—Statement prescribed.—Account and vouchers to be filed. See Act Feb. 22, 1875, 18 Stat. L., 333.

*Rev. Stats. sec. 5504.]* Clerks and other officers of courts failing to deposit moneys of court with the Treasurer, or other depositary, or who retain or embezzle same, punished by fine and imprisonment; but money may be delivered on security under direction of court.

*Rev. Stats. sec. 5505.]* Receiving loan or deposit of money belonging to court from any clerk or other officer of court, is embezzlement, and punished, etc.

*Act Mar. 3, 1875, sec. 1, 18 Stat. L. 479.]* Embezzling, stealing or purloining money, property, record, vouchers, etc., is felony, and punished, etc..

*Same Act, sec. 2, Same place.]* Receiving or concealing money, property, record, voucher, etc., punished, etc., and receiver may be tried before or after conviction of principal.

*Act Mar. 3, 1883, 22 Stat. L. 631.]* Clerk not to retain of his fees and emoluments more than six thousand dollars per annum for his own compensation, over and above necessary clerk hire and incidental expenses certified by court or justice appointed for that purpose, and audited, etc., by officers of Treasury.—Surplus of fees, etc., to be paid into Treasury.—Act for compensation of clerk for attendance in court repealed.—Supreme Court to prepare table of clerk's fees, but, until same is prepared, copying and recording not to exceed fourteen cents per folio.

#### Decisions.

The appointment of clerks being vested in the courts, and there being no provision of law for their removal, their offices are to be held during

good behavior, subject to the will or discretion of the court appointing them, by which they may be removed at pleasure. *Ex parte Hennan*, 13 Peters, 230.

A clerk temporarily appointed during the absence of the regular incumbent, is an officer *de facto*, although it should appear that the court had no power to make such temporary appointment, and his acts as clerk must be regarded as valid so far as they may concern other persons interested in them. *Cooke v. Halsey*, 16 Peters, 71.

The appointment of a new clerk and notice of the fact to the old incumbent is a removal of the latter, at least as far as his rights are concerned. *Ex parte Hennan*, 13 Peters, 230.

A deputy clerk authorized by general rule to act the same as the principal, or who is especially directed so to do in the presence of the judge, is empowered to administer an oath, and such oath is binding. *U. S. v. Nichols*, 3 *McLean*, 23.

A clerk guilty of no neglect in superintending his deputy is not liable for the honest error of judgment of such deputy, provided he be a person of good understanding and correct demeanor, and capable of performing with propriety and correctness the duties of deputy clerk. *Patons v. Lee*, 2 *Cranch C. C.* 646.

The clerk being required by the Act of Mar. 3, 1883, to pay into the Treasury all fees and emoluments of his office over and above his compensation as fixed by law and his necessary clerk hire and incidental expenses, it is proper that, for his protection, his fees should be paid in advance, if demanded. *Steever v. Rickman*, 3 *Sup. Ct. Rep.* 67.

## RULE II.—*Attorneys and Counselors.*

(1.) It shall be requisite to the admission of attorneys or counselors, to practice in this court, that <sup>Admission of attorneys and counselors.</sup> they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

(2.) They shall respectively take and <sup>Oath.</sup> subscribe the following oath or affirmation, viz : I, — — —, do solemnly swear, [or affirm,] that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

First paragraph promulgated Feb. 5, 1790, as original 2, 1 Cranch, xv ; republished, 1 Wheaton, xv ; again republished, 1 Peters, vi ; revised and corrected, December Term, 1858, 21 How., v. Second paragraph promulgated Feb. 5, 1790, as original rule 4, 1 Cranch, xv, amended as rule 6, Feb. 7, 1791, 1 Cranch, xv; republished, 1 Wheaton, xiv ; again republished 1 Peters, vi ; revised, corrected and made part of this rule, December Term, 1858, 21 How. v ; amended December Term, 1864, 2 Wall. vii ; amendment rescinded December Term, 1866, 4 Wall. vii.

*Note.*—Original rule 3, promulgated February 5, 1790, 1 Cranch, xv, providing that counselors should not practice as attorneys, nor attorneys as counselors, of this court, and original rule 14, promulgated August 12, 1801, 1 Cranch xvii, providing that counselors might be admitted as attorneys on taking the usual oath, were abrogated on the revision and correction of the rules at the December Term, 1858, 21 How. v.

#### Statutory Provisions.

*Rev. Stats. sec. 747.]* In all courts of the United States parties may plead and manage their causes personally or by attorneys and counsel duly qualified to conduct causes therein.

*Rev. Stats. sec. 823.]* Attorneys, solicitors and proctors may charge reasonable compensation in addition to statutory fees, as may accord with general usage, or be agreed between the parties.

*Rev. Stats. sec. 824.]* Taxable costs of solicitors, attorneys, and proctors. (Act June 23, 1874, chap. 469, sec. 7, 18 Stat. L. 253, extends this section to Utah Territory.)

*Rev. Stats. sec. 982.]* Attorneys, proctors, etc., unreasonably and vexatiously multiplying proceedings required to pay costs.

*Rev. Stats. sec. 983.]* Costs and disbursements, how taxed. (Act June 23, 1874, chap. 469, sec. 7, 18 Stat. L. 253, extends this section to Utah Territory.)

*Rev. Stats. sec. 4064.]* Attorney, solicitor or other person suing out process of arrest, imprisonment or attachment against any foreign minister acknowledged by the President, or against domestic or domestic servant of same, punished by fine and imprisonment.

*Rev. Stats. sec. 5498.]* Officers connected with Executive Department of the Government, or with Senate or House of Representatives, not to be attorneys to prosecute claims against the United States. Violation of this provision punished.

*Act Feb. 15, 1879, 20 Stat. L. 292.]* Women admitted to highest court of State, Territory, or District of Columbia for three years, and of good standing and character, shall, on motion, etc., be admitted to Supreme Court of the United States.

#### Decisions.

The Supreme Court will not refuse to admit to its bar an attorney and counselor who may have been stricken from the roll of attorneys of another court for a contempt committed therein, provided the applicant for admission to the Supreme Court is otherwise qualified. *Ex parte Tillinghast*, 4 Peters, 108.

The authority of an attorney to appear in a suit may be questioned, and the court in a proper case will require him to produce his authority. *Standefer v. Dowlin*, 1 *Hempst.* 209; *King of Spain v. Oliver*, 2 *Wash. C. C.* 429.

But when an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed, and a record which shows such an appearance will bind the party until it is proved that the attorney acted without authority. *Hill v. Mendenhall*, 21 *Wall.* 453.

On the death of an attorney of record, or counsel, papers cannot be served on his executor, or on his former law partner, unless such partner previously appears on the record. The character and duties of an attorney do not devolve on his executor, nor can the courts notice law partnerships or other private arrangements between members of the bar. *Bacon v. Hart*, 1 *Black*, 38.

The court may strike an attorney from the rolls for fraudulent conduct, although not criminally punishable. *U. S. v. Porter*, 2 *Cranch C. C.* 60.

The court has power to either suspend an attorney from practice for a limited time, or to expel him altogether. *Ex parte Burr*, 2 *Cranch C. C.* 379.

In case of complaint against an attorney the charge must be preferred under oath. *Ex parte Burr*, 9 *Wheaton*, 529.

But it is otherwise where the attorney himself invites an investigation; and if the court suspends or dismisses him upon proofs under oath, the proceedings are not irregular for want of a sworn preliminary charge. *Ib.*

The Supreme Court has not jurisdiction to reverse by *mandamus* the action of a district or circuit court in removing an attorney, &c., from office. *Tillinghast v. Conkling*, unreported, but cited and effect stated by TANEY, C. J., in *Ex parte Lecombe*, 19 *How.* 13.

The client may change his attorney, and, upon application, a rule will be granted to that end, saving, however, the lien of the attorney on papers or moneys in his hands as security for his disbursements and fees. *In re Paschal*, 10 *Wall.* 483.

An attorney cannot be disbarred for misbehavior without an opportunity of defense or explanation. *Ex parte Bradley*, 7 *Wall.* 364.

But it is not necessary that formal allegations should be made. All that is requisite is that notice should be given to the attorney of the charge made against him, and an opportunity given for explanation and defense. *Randall v. Bingham*, 7 *Wall.* 523.

A refusal by the courts of a State to admit a woman to practice does not violate any provision of the Constitution of the United States, or amendments. *Bradwell v. State*, 16 *Wall.* 130.

Attorneys and counselors are officers of the court, and responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been given. *Ex parte Garland*, 4 *Wall.* 321.

The obligation assumed by attorneys when admitted to the bar is not only to observe courteous demeanor in court, but includes abstaining out of court from insulting language and offensive conduct towards judges personally for their judicial acts. Therefore, a threat of personal chastisement by an attorney to a judge out of court for his acts as judge during the trial of a cause pending is good ground for disbarring such attorney. *Bradley v. Fisher*, 13 *Wall.* 335.

Under the constitution and laws of the United States, a court of the

United States is without power to admit women to the bar, and a woman is without legal capacity to take the office of attorney and counselor. *Lockwood v. U. S.*, 9 Ct. of Claims, 346. (But see Act Feb. 15, 1879, 20 Stat. L. 292, *supra*.)

An attorney cannot be disbarred for refusing, in the presence of the court, to make answer in writing to a rule, upon the ground of so punishing such refusal as a contempt. *Ex parte Robinson*, 19 Wall. 505.

Nor can an attorney be disbarred, even for misconduct in open court, without giving him notice of the grounds of complaint against him, and an opportunity to be heard. *Ib.*

The power to disbar an attorney can only be exercised when there has been such misconduct as shows him to be unfit to be a member of the profession. *Ib.*

The appearance of counsel specially for a corporation, and moving to dismiss the petition of an individual creditor for the appointment of a receiver of its property, does not preclude him from subsequently appearing for the trustee of the bondholders in proceedings to foreclose mortgages given by the corporation. *Shaw v. Bill*, 95 U. S. 10.

Although a client can change his attorney whenever he pleases, subject to the attorney's lien, such lien does not extend so far as to enable the solicitor to stay or delay the proceedings in the suit. *Isaacs v. Abraham*, 6 Reporter, 737.

The participation of an attorney in a riot and inciting the lynching of a man is a sufficient ground for striking his name from the roll. *Ex parte Wall*, 2 Sup. Ct. Rep. 569.

The striking of the name of an attorney from the roll not being a criminal proceeding, indictment and trial by jury are not necessary, although the grounds for such dismissal are criminally punishable. *Ib.*

In case the attorney is dealt with by the court by striking his name from the roll on the ground that he has been guilty of a criminal offense rendering him unfit to longer remain in his office of attorney, such dismissal will not be disturbed by the Supreme Court because no indictment and trial were had previously to such dismissal. *Ib.*

### RULE III.—*Practice.*

This court considers the former practice of the courts of Practice of king's bench king's bench and of chancery, in England, and chancery in Eng- land. as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

Promulgated Aug. 8, 1791, as original rule 7, 1 Crauch, xvi; republished, 1 Wheaton, xiv; again republished, 1 Peters, vi; revised, corrected and made rule 3, December Term, 1858, 21 How. v; amended Jan. 7, 1884.

### RULE IV.—*Bill of Exceptions.*

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the

charge of the court at large to the jury Bill of exceptions not in trials at common law, upon any general to contain charge to jury at large.  
exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts ; and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.

Promulgated as rule 4 on revision at December Term, 1858, 21 How. vi.

#### Statutory Provisions.

*Rev. Stats. sec. 953.]* A bill of exceptions shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge annexed thereto.

*Rev. Stats. secs. 649, 700.]* Issues of fact in civil cases may be tried by circuit court without a jury, if parties stipulate in writing. Findings to be general or special, and to have same effect as verdict of jury. The rulings of the court in progress of trial, if excepted to and duly presented by bill of exceptions, may be reviewed in Supreme Court on error or appeal; and, when finding special, review may extend to sufficiency of facts found to support judgment.

*Act Feb. 16, 1875, 18 Stat. L. 315.]* Causes in admiralty reviewed only upon a record containing findings of fact and conclusions of law, and upon such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law.

#### Decisions.

A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was requested. *Vasse v. Smith, 6 Cranch, 226.*

Though a bill of exceptions may be drawn up and signed after the trial, the exceptions must be taken at the trial, and, when signed, must purport on their face to have been so taken, and to have been then allowed and signed. *Walton v. U. S., 9 Wheaton, 651.*

It is unnecessary and irregular to set out the evidence in a bill of exceptions when no exception was taken to its competency or sufficiency. *Pennock v. Dialogue, 2 Peters, 1.*

The practice of bringing the whole charge of the court below before this court reprobated. *Carver v. Jackson, 4 Peters, 1; Crane v. Crane, 5 Ib. 190.*

The law requires a bill of exceptions to be tendered at the trial. If it be drawn up afterwards, it should be done immediately, and during the term. To sign it after the term is matter of consent or special order of the judge. *Bradstreet v. Jackson, 4 Peters, 102.*

If the party intends to take a bill of exceptions, he should give notice

to the judge at the trial ; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. *Ib.*

The Supreme Court will not order a judge to sign a particular bill of exceptions which he returns as not conformable to the truth. *Ib.*

The Supreme Court has power to issue a *mandamus* to a judge of a circuit court commanding him to sign a bill of exceptions. *Crane v. Crane*, 5 *Peters*, 190.

It is the duty of a party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it. If the exception covers any admissible evidence, it is properly overruled. *Moore v. Bank Metropolis*, 13 *Peters*, 302.

A naked statement on the record that the reading of a disposition, or copy of a record, was objected to, without disclosing the nature or ground of the objection, is nugatory, and wholly ineffectual in a court of error. *Camden v. Doremus*, 5 *How.* 515.

The record must show that an exception was taken at the trial at the stage when its cause arose, but the time and manner of placing the exception on the record may be regulated by the practice of the courts below. *Turner v. Yates*, 16 *How.* 14.

An allegation that the charge of the court, the verdict of the jury, and the judgment below "are each against and in conflict with the constitution and laws of the United States," is too general and indefinite to be considered. *Maxwell v. Newbold*, 18 *How.* 511.

Rulings of the court below in admitting or rejecting evidence can be brought to this court for revision only by a bill of exceptions. *Suydam v. Williamson*, 20 *How.* 427.

Where there is a bill of exceptions, the writ of error does not operate only upon that part of the record. Wherever an error is apparent on the record, it is open to revision, whether it be made to appear by a bill of exceptions or in any other manner. *Ib.*

A bill of exceptions should contain only so much of the evidence as is necessary to present the legal question raised. When more than this is inserted in the bill, it is an irregularity, to be condemned as a departure from established practice, inconvenient and embarrassing to the court. *Johnson v. Jones*, 1 *Black*, 209 ; *Lincoln v. Claflin*, 7 *Wall.* 132.

Where a series of propositions are embodied in the instructions of the court, which are excepted to in mass, the exception must be overruled if any one proposition be sound. *Ib.*

Where a bill of exceptions fairly discloses the fact that exceptions were taken at the proper time, the right to review will not be defeated by a misuse of words or because the bill was unskillfully drawn. *Simpson v. Dall*, 3 *Wall.* 460.

Where a paper is not incorporated in the bill of exceptions it must be annexed to it, or so marked by means of identification mentioned in the bill as to leave no doubt that it is the one referred to ; otherwise it will be disregarded. *Leftwitch v. Lecanu*, 4 *Wall.* 187.

It is the duty of counsel, excepting to propositions submitted to a

jury, to except to such propositions distinctly and severally; and although the court may err in some of the propositions, yet if they are excepted to in mass, the exception will be overruled, provided one of the propositions be correct. *Rogers v. The Marshal*, 1 *Wall.* 644; *Harvey v. Tyler*, 2 *Wall.* 328.

The court reprehends the practice of making bills of exception a sort of abstract or index to the history of the case, and so of obscuring its merits. *Evans v. Patterson*, 4 *Wall.* 224.

To be of any avail, exceptions must be drawn up so as to present distinctly the ruling of the court upon the points raised, and must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by an appellate court. *Young v. Martin*, 8 *Wall.* 354. (But see *Rev. Stats.* sec. 953, *supra*.)

The special finding of facts mentioned in the act providing for trials without jury (*Rev. Stats.* secs. 649, 700, *supra*), is not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties. If the finding of facts be general, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by a bill of exceptions. *Norris v. Jackson*, 9 *Wall.* 125.

In such a case the bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. *Ib.*

Objections to the admission or rejection of evidence, or to such rulings or propositions of law as may be submitted to the court, must in such cases be shown by bill of exceptions. *Ib.*

If the parties desire a review of the law in such cases, they must ask the court to make a special finding which raises the question, or get the court to rule on the legal propositions which they present. *Ib.* (See also *Flanders v. Tweed*, 9 *Wall.* 425; *Coddington v. Richardson*, 10 *Wall.* 516; *Dirst v. Morris*, 14 *Wall.* 484; *Dickenson v. Planters' Bank*, 16 *Wall.* 250; *Insurance Co. v. Folsom*, 18 *Wall.* 237; *Town of Ohio v. Marcy*, 18 *Wall.* 542.)

Under the Act of Congress authorizing the trial of facts by the circuit court without a jury (*Rev. Stats.*, secs. 649, 700), the court must itself find the facts in order to authorize a writ of error. A statement of facts signed by counsel and filed after the judgment is insufficient. *Bethell v. Mathews*, 13 *Wall.* 1.

A plaintiff in error cannot take advantage of exceptions in his own favor, even if erroneous. *Bethell v. Mathews*, 13 *Wall.* 1.

A bill of exceptions which alleges that the instructions of the court laid too large a stress upon the testimony of a particular witness should embody the testimony at length, or so refer to it as to make it a part of the record. Otherwise the court must presume that it justified the instruction. *Russell v. Ely*, 2 *Black.* 575.

Neither the rulings of the court in admitting or excluding evidence, nor the instructions given by the court to the jury, are a part of the record

on appeal, unless made so by a proper bill of exceptions. *Storm v. U. S.*, 94 U. S. 76; *Insurance Co. v. Lanier*, 95 U. S. 171.

A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to that court. *Johnson v. Harmon*, 94 U. S. 371.

The judge's notes do not constitute a bill of exceptions. They are but memoranda from which a formal bill of exceptions may afterwards be drawn up. *Pomeroy v. Bank of Indiana*, 1 *Wall.* 592.

Where a bill of exceptions does not show what answer was made to a question put to a witness, error cannot be assigned upon the question, *Lovell v. Davis*, 101 U. S. 541.

The power to reduce exceptions taken at the trial to form, and have them signed and filed is confined, under ordinary circumstances, to the term at which the judgment was rendered. *Muller v. Ehlers*, 91 U. S. 249; *Whalen v. Sheridan*, 5 *Fed. R.* 436; S. C., 10 *Ib.* 661.

State statutes and rules have no application to bills of exception in the courts of the United States. *Whalen v. Sheridan*, 5 *Fed. R.* 436; S. C., 10 *Ib.* 661.

Poverty or pecuniary embarrassment is not a sufficient excuse for delay in filing a bill of exceptions. *Whalen v. Sheridan*, 5 *Fed. R.* 436; S. C., 10 *Ib.* 661.

But the court, in the exercise of its sound discretion to prevent manifest hardship, may relax the rule requiring a bill of exceptions to be served, settled and signed within the prescribed time. *Coe v. Morgan*, 13 *Fed. R.* 844; *U. S. v. Breitling*, 20 *How.* 252; *Marye v. Strouse*, 5 *Fed. R.* 495.

Exceptions reserved at the trial of a cause may, within such time thereafter during the term as the judge shall deem reasonable, be reduced to form and presented to him for signature, and they are not waived by suing out a writ of error before his signature is obtained. *Hunnicutt v. Peyton*, 102 U. S. 333.

Where, under such circumstances, bills of exception are signed during the term, it is not necessary, to render them effective, that they be ante-dated, or ordered to be filed *nunc pro tunc*, as of a time during the trial. *Ib.*

The rule that where any portion of the charge to the jury is correct an exception to the entire charge will not be sustained, reaffirmed, and held to apply to a general exception taken to the report of a referee. *Boogher v. Insurance Co.*, 103 U. S. 90.

The court condemns the practice of setting out in the bill of exceptions the entire charge of the court below, instead of confining it to such parts as are the subject of exception. *U. S. v. Rindskopf*, 105 U. S. 418.

Under the Act of Feb. 16, 1875 (18 *Stat. L.* 315, *supra*), the finding of facts by the circuit court in admiralty cases is conclusive; and only rulings upon questions of law can be reviewed by bill of exceptions. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 U. S. 214.

The findings which, in admiralty causes in the circuit court, the Act

of Feb. 16, 1875 (18 *Stat. L.* 315, *supra*), requires, are in the nature of a speelial verdict, and constitute a part of the record. The law arising thercon will therefore be determined here, although no exception thereto was taken. *The S. C. Tryon*, 105 *U. S.* 267.

But a bill of exceptions is required to reserve for review the rulings below upon questions of law arising during the progress of the trial. *Ib.*

The said act is constitutional. *The Francis Wright*, 105 *U. S.* 381.

The court condemns the practice of drawing up bills of exception which, so far from being prepared as in actions at law, are framed, as if possible, to secure a re-examination of the facts. *Ib.*

A refusal to make any finding as to a disputed fact, or a finding without any evidence to support it, if duly excepted to, may, as a question of law, be reviewed in the Supreme Court. *Ib.*

If one of a series of propositions presented to a court as one request for a charge to the jury is unsound, an exception to a refusal to charge the entire series cannot be maintained. *Beaver v. Taylor*, 93 *U. S.* 46.

An exception to the entire charge of the court, or, in gross, to a series of propositions therein contained, cannot be sustained if any portion of the matter thus excepted to is sound. *Ib.*

An exception to such portions of a charge as are variant from the requests made by a party, not pointing out the variances, cannot be sustained. *Ib.*

The omission of the judge to instruct the jury on a particular aspect of the case, however material, cannot be assigned as error unless his attention was called to it with a request to instruct upon it. *Mutual Life Ins. Co. v. Snyder*, 93 *U. S.* 393.

When the record shows that an exception was taken and reserved at the trial, it is not necessary that the bill of exceptions be drawn out in form and signed or sealed by the judge, before the jury retires; but it may be so signed or sealed at a later period; and when filed *nunc pro tunc*, pursuant to order, brings the case within the settled practice of courts of error. *Stanton v. Embry*, 93 *U. S.* 548.

Wrts of error to the Supreme Court of the District of Columbia, being governed by the same rules and regulations as are those to the circuit courts, the practice in relation to bills of exception is the same. *Ib.*

Exceptions to the charge of the court which are in general terms, and do not clearly and specifically point out the objectionable part of it, cannot be sustained as a ground for reversing the judgment. *R. R. Co. v. Varnell*, 98 *U. S.* 479.

Where error is assigned upon instructions given, and those refused, the bill of exceptions must set forth so much of the evidence as tends to prove the facts out of which the question is raised to which the instructions apply. When, therefore, the bill of exceptions embodies only the instructions given and those refused, this court will not reverse the judgment. *Worthington v. Mason*, 101 *U. S.* 149.

This court will not pass upon the charge below where the bill of exceptions does not set forth the evidence and there is nothing to show

that the question of law to which the charge relates is involved in the issue. *Jones v. Buckell*, 104 U. S. 554.

A bill of exceptions in admiralty must be based on exceptions taken to the rulings at the time they were made. *Richardson v. The Ship Havre*, 4 Fed. R. 748.

Where no exceptions were taken during the trial, in an admiralty cause, the only paper which can be signed on appeal is the record of the proceedings, embodying the requests on both sides, and also the findings and the written opinion of the court, and the exceptions filed showing the dates of the several proceedings. *Ib.*

#### RULE V.—*Process.*

(1.) All process of this court shall be in the name of the *President*.  
*Process in name of President of the United States.*

(2.) When process at common law or in equity shall issue *Against State, how served.* against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.

(3.) Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return-day, the complainant shall be at liberty to proceed *ex parte*.

First paragraph promulgated Feb. 5, 1790, as original rule 5, 1 Cranch, xx; republished 1 Wheaton, xiv; again republished, 1 Peters, vi; revised and corrected December Term, 1858, 21 How. vi. Second paragraph promulgated August 12, 1796 but, owing to the omission of the clerk to engross the same with the other rules, was not published in the reports until 3 Peters, xvii; revised and made part of this rule, December Term, 1858, 21 How. vi. Third paragraph promulgated August 12, 1796, as original rule 10, 1 Cranch, xvi; republished 1 Wheaton, xv; again republished 1 Peters, vi; revised, corrected, and made part of this rule, December Term, 1858, 21 How. vi.

#### Statutory Provisions.

*Rev. Stats. sec. 911.]* All writs and processes issuing from the courts of the United States to be under seal of the court and signed by the clerk; and those issuing from the Supreme and circuit courts to bear teste of the Chief Justice, or senior Associate, when office of Chief Justice is vacant.

*Rev. Stats. sec. 912.]* All process issued from the United States courts shall bear teste the day of issue.

*Rev. Stats. sec. 917.]* Supreme Court may prescribe the forms of writs and other process, etc., not inconsistent with law, in equity and admiralty, for the circuit and district courts.

*Rev. Stats.* sec. 4063.] Process against the person or property of foreign minister or domestic, or domestic servant, void. (See *Rev. Stats.* sec. 687.)

*Rev. Stats.* sec. 4064.] Penalty for suing out or issuing process against foreign minister or servant.

*Rev. Stats.* sec. 4065.] The two preceding sections do not apply to case of process against a citizen of the United States in the service of a public minister founded on debt contracted before entering such service; nor to any domestic servant of such minister, unless name of servant is registered in Department of State and transmitted to Marshal of Dist. Col. before such process issues.

*Rev. Stats.* sec. 5394.] Stealing, taking away, altering, falsifying, or avoiding record, writ, process, or other proceeding in courts of United States, causing reversal or avoidance of any judgment, etc., punished.

#### Decisions.

A State having been duly served with process and not appearing, the court, at the next term after the return term, made an order that judgment by default should be given against the State, unless an appearance should be entered or cause shown by the first day of the next term. *Chilsom v. Georgia*, 2 *Dall.* 419.

Service of process on the Governor and Attorney-General of a State, is service on the State. *Id.* (See also *Grayson v. Virginia*, 3 *Dall.* 320.)

A subpoena in equity to a State is to be served sixty days before the return day, and if the State do not appear on the return day the plaintiff may proceed *ex parte*. *Grayson v. Virginia*, 3 *Dall.* 320.

Where a subpoena to a State was not served sixty days before the return day thereof, as required by the rules of this court, a new subpoena was awarded returnable to the next term. *New Jersey v. New York*, 3 *Peters*, 461.

A subpoena having been duly served and the State failing to appear, a rule was entered that the complainant be at liberty to proceed *ex parte*, and that if the State, being duly served with the rule, should not appear and answer on the second day of the next term, the court would hear the cause *ex parte*. *New Jersey v. New York*, 5 *Peters*, 284.

An order that a party appear and answer before a day certain, is complied with by filing a demurrer. *New Jersey v. New York*, 6 *Peters*, 323.

If the defendant, having been duly served with process, does not choose to appear, or withdraws the appearance on leave, the complainant may proceed *ex parte*. *R. I. v. Mass.*, 12 *Peters*, 657, 755.

The court will not apply, to suits between States, the same rules as to time of answering which govern suits between individuals. *R. I. v. Mass.*, 13 *Peters*, 23.

In a suit between two States the Supreme Court has original jurisdiction, without any further act of Congress regulating the mode and form in which it shall be exercised. *Kentucky v. Ohio*, 24 *How.* 66.

A suit by or against the Governor of a State, as such, in his official capacity, is a suit against the State. *Id.*

A bill purporting to enjoin the President of the United States from carrying into effect an act of Congress will not be permitted to be filed in this court. *Mississippi v. Johnson*, 4 *Wall.* 475.

Though there is no general rule of court in regard to the matter, when a party desires to file a bill in original jurisdiction in equity, it has been usual to hear a motion in his behalf for leave to do so. This motion, except under peculiar circumstances (as when a bill is asked to be filed against the President of the United States), is heard only on the part of the complainant. *Georgia v. Grant*, 6 *Wall.* 241.

The motion for leave to file a bill in original jurisdiction will be heard on the usual motion day, and only on the part of the complainant, and the court will require that ten printed copies of the bill shall be filed with the clerk before the hearing. *Id.*

Though the rules made by the Supreme Court for the government of the practice of the circuit courts in equity are undoubtedly binding on the latter, they were not intended to deprive them of power to give time to appear and answer in special cases. *Poultney v. City of Lafayette*, 12 *Peters*, 472.

The Supreme Court cannot enlarge or diminish the jurisdiction of the courts of the United States by any rule of practice, but it has power over their process and mode of procedure in equity and admiralty. *The St. Lawrence*, 1 *Black*, 522. (See also *Noonan v. Lee*, 2 *Black*, 499.)

Process cannot be served upon a foreign minister. *U. S. v. Benner*, 1 *Baldw.* 234. (See also *Ex parte Cabrera*, 1 *Wash. C. C.* 232; *U. S. v. Lafontaine*, 4 *Cranch, C. C.* 173.)

#### RULE VI.—*Motions.—Motion day.*

(1.) All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

(2.) One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

(3.) No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

(4.) All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted in the first instance on printed briefs or arguments.

If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least

Notice of three weeks,  
except where opposite  
party resides west of  
Rocky Mts. to be thir-  
ty days.

three weeks before the time fixed for submitting the motion, in all cases, except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid,

Proof of service.

at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima-facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

(5.) There may be united with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Motion to affirm may  
be united with motion  
to dismiss.

(6.) The court will not hear arguments on Saturday, (unless for special cause it shall order to the contrary,) but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

No argument on Sat-  
urday.

Motion day; prefer-  
ence.

See Supreme Court Rules 9, 16, 18.

First paragraph promulgated January Term, 1838, as original rule 51, 12 Peters, iv; revised and made rule 6, December Term, 1858, 21 How. vi. Second paragraph promulgated December 18, 1876, 93 U. S. vii. Third paragraph promulgated December Term, 1867, 6 Wall. v. Fourth paragraph promulgated May 6, 1872, 13 Wall. xi. Fifth paragraph promulgated May 8, 1876, Wall. vii. Sixth paragraph promulgated February Term, 1824, 9 Wheaton, iv; republished as original rule 83, 1 Peters, xi; amended January Term, 1845, 3 How. v; revised and made rule 27, December Term, 1858, 21 How. xv; amended and made part of this rule December 14, 1874, 20 Wall. xv.

**Decisions.**

A collusive suit presented for the purpose of securing the opinion of the court will be dismissed on motion. *Lord v. Veazie*, 8 *How.* 251.

The advantage of expiration of the limitation for bringing a writ of error or appeal may be taken by motion to dismiss. *Brooks v. Norris*, 11 *How.* 204.

Where the record states that an appeal from a decree was taken in open court, no evidence *dehors* the record, can be received to impeach its verity on a motion to dismiss the appeal for want of jurisdiction on the ground that the case has not been regularly brought up. *Hudgins v. Kemp*, 18 *How.* 530.

A motion to dismiss is to be heard on the record as it stands. If the record is defective the error must be suggested and a *certiorari* moved for to bring up a correct transcript. *Ib.*

The Supreme Court will not, on motion, dismiss an appeal taken on the ground of want of jurisdiction of the court below. Such a question is a proper one for appeal and for argument when regularly reached. *Nelson v. Leland*, 22 *How.* 48.

An appeal will be dismissed on motion if it appears that one of the parties has purchased or succeeded to the rights of the other, pending the appeal. *Cleveland v. Chamberlain*, 1 *Black*, 419.

A dismissal by agreement of the parties will not be set aside on motion of the attorney for the defendant who claims a lien for his costs. *Platt v. Jerome*, 19 *How.* 384.

Want of jurisdiction and irregularity of the writ of error are the only grounds for dismissal; and the court will not, on motion, dismiss the writ on the ground that there is no error on the face of the record. This is matter to be argued when the case is reached. *Hecker v. Fowler*, 1 *Black*, 95.

Where want of jurisdiction is patent, or can be readily ascertained by an examination of the record in advance of an argument, in its order, on the merits, this court will entertain and act upon a motion to dismiss for want of jurisdiction. *Semple v. Hager*, 4 *Wall.* 431.

Error may be shown by bill of exceptions, or by demurrer to pleadings, or it may appear by an agreed statement of facts, or by special verdict. But even when all these are wanting, a motion to dismiss will not be entertained. Their absence only shows that there is no error in the record, and the party will be entitled to judgment of affirmance when the case is reached. *N. O. R. R. v. Morgan*, 10 *Wall.* 256.

When a case is within the jurisdiction of the court, and there has been no defect in removing it from the subordinate court to this, the court will not dismiss the case on motion in advance of the regular call of the docket. *The Eutaw*, 12 *Wall.* 136.

A case will not be dismissed on motion simply because the court may be of opinion that it has been brought here for delay only. The authority of the court to adjudge damages under Rev. Stats., sec. 1010,

and rule 23 of this court, is the only power to prevent frivolous appeals and writs of error. *Amory v. Amory*, 91 U. S. 356.

Where a party sued out a writ of error and also obtained the allowance of an appeal and duly filed a transcript of the record, the court will not, on motion, dismiss the cause, but when it comes to be heard will determine whether it is properly here by appeal or by writ of error. *Hurst v. Hollingsworth*, 94 U. S. 111.

This court, where it manifestly has no jurisdiction over the matter in controversy, will entertain a motion to dismiss even before the return day, although the former practice was otherwise. *Ex parte Russell*, 13 Wall. 671; *Thomas v. Woodbridge*, 23 Id. 288; *Clark v. Hancock*, 94 U. S. 493.

Although under this rule the plaintiff in error or appellant may, with a motion to dismiss, unite a motion to affirm, still, where there is no color of right to a dismissal, the case being clearly within the jurisdiction of the court, a motion to affirm merely will not be sustained. *Whitney v. Cook*, 99 U. S. 607.

Motions to dismiss will not be decided before the record is printed, when there is any question about facts upon which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable the court to act understandingly without referring to the transcript on file. *National Bank v. Insurance Co.*, 101 U. S. 43.

Where the appellee has a color of right to dismissal, he may unite with a motion to dismiss a motion to affirm. *Hinckley v. Morton*, 103 U. S. 764.

Where the record is such as to furnish a sufficient color of right to dismissal to justify the court in entertaining with a motion to dismiss a motion to affirm, although the grounds for dismissal be removed by further showing, the motion to affirm will be granted when it is manifest that the writ was sued out for delay. *Micas v. Williams*, 104 U. S. 556.

A writ of error will not be dismissed by reason of a failure to annex thereto or return therewith an assignment of errors pursuant to Rev. Stats., section 997. If an assignment is filed in accordance with the requirements of rule 21, it will ordinarily be enough. *School District of Ackley v. Hall*, 106 U. S. 428.

Where, under the circumstances of the case, it may be that an appeal was well taken, the court may postpone the consideration of a motion to dismiss until the hearing on the merits. *Mayer v. Walsh*, 1 Sup. Ct. Rep. 417.

#### RULE VII.—*Law Library.—Conference-room.*

(1.) During the session of the court, any gentleman of the bar having a case on the docket, and wishing Counsel may take books from the library; regulated to use any book or books in the law-library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one

time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

(2.) The clerk shall deposit in the law library, to be there  
Clerk to deposit in law library printed record in every case. carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

(3.) The marshal shall take charge of the books of the  
Marshal to take charge of books of court; conference-room. court, together with such of the duplicate law-books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner ; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

First paragraph promulgated January Term, 1833, as original rule 40, 7 Peters, iv; revised and made part of this rule, December Term, 1858, 21 How. vi. Second paragraph promulgated October 25, 1875, 91 U. S. vii; amended January 7, 1884. Third paragraph promulgated on revision of rules, December Term, 1858, 21 How. vii.

#### Statutory Provisions.

*Rev. Stats. sec. 81.] Library of Congress arranged in two departments, general library and law library.*

*Rev. Stats. sec. 83.] Incidental expenses of law library paid out of appropriations for library of Congress.*

*Rev. Stats. sec. 84.] Librarian of Congress to purchase books for the law library under direction and pursuant to catalogue of Chief Justice of Supreme Court.*

*Rev. Stats. secs. 93 and 94.] Certain persons enumerated entitled to take books from library.*

*Rev. Stats. sec. 95.] Supreme Court Justices to have free access to law library, and authorized to make regulations for use of the same when court is sitting ; but cannot restrict persons otherwise authorized to take books from the library or using books in same manner as general library.*

*Rev. Stats. sec. 96.] Ten copies Statutes at Large, by Little, Brown & Co., to be for use of Justices of the Supreme Court.*

*Rev. Stats. secs. 96 and 97.] Journals and documents printed by Congress and printed copies of their own journals to be deposited in the library,*

*Act June 19, 1878, 20 Stat. L. 171.] Stealing, defacing, injuring, mutilating, tearing or destroying book, pamphlet, etc., of library of Congress, etc., etc., punished.*

**RULE VIII.—Writ of error, Return, and Record.**

(1.) The clerk of the court to which any writ of error may be directed shall make return of the same, <sup>Return to writ of error.</sup> by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

(2.) In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the <sup>Copy of opinion of</sup> <sup>court to be transmitted</sup> clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

(3.) No case will be heard until a complete record, containing in itself, and not by reference, all the <sup>Cause not heard until</sup> <sup>record complete.</sup> papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

(4.) Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, <sup>Original papers.</sup> or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper ; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

(5.) In cases where final judgment is rendered more than thirty days before the first day of the next <sup>When writ of error and citation returnable.</sup> term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day ; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day.

(6.) The record in causes of admiralty and maritime jurisdiction, when under the requirements of law <sup>Record in admiralty and maritime cases.</sup> the facts have been found in the court below, and the power of review is limited to the determination of

questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

See Sup. Ct. Rules 9, 23, 29, 32. See also rules relating to appeals from Court of Claims and Admiralty rule 52.

First paragraph promulgated February 13, 1797, as original rule 11, 1 Cranch, xvi; republished 1 Wheaton, xv; again republished, 1 Peters, vii; revised and made part of this rule, December Term, 1858, 21 How. vii; amended January 7, 1884. Second paragraph promulgated as an amendment to this rule, April 28, 1873, 15 Wall. v. Tbird paragraph promulgated February Term, 1823, 8 Wheaton, vi; republished as original rule 30, 1 Peters, x; revised and made part of this rule, December Term, 1858, 21 How. vii. Fourth paragraph promulgated February Term, 1817, 2 Wheaton, vii; republished as original rule 25, 1 Peters, ix; revised and made part of this rule, December Term, 1858, 21 How. vii. Fifth paragraph promulgated December Term, 1807, 6 Wall. vi. Sixth paragraph promulgated May 2, 1881, as an addition to this rule, 103 U. S. xiii.

#### Statutory Provisions.

*Rev. Stats. sec. 997.]* There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. (The assignment of errors may be omitted if made in the brief as required by rule 21.) School Dist. *v.* Hall, 106 U. S. 428.

*Rev. Stats. sec. 998.]* When issued by a circuit court to a district court, citation to be signed by judge of district, circuit or Supreme Court, and at least twenty days' notice given.

*Rev. Stats. sec. 999.]* When issued by Supreme Court to circuit court, citation shall be signed by judge of circuit or Supreme Court, and at least thirty days' notice given; and when issued to State court, citation shall be signed by Chief Justice, judge or chancellor of State court, in which judgment rendered, or Justice of Supreme Court, and at least thirty days' notice given.

*Rev. Stats. sec. 1002.]* Writs of error shall be prosecuted from final judgments of district courts acting as circuit courts in same manner as from final judgments of circuit courts.

*Rev. Stats. sec. 1003.]* Writs of error from Supreme Court to State court issued and prosecuted in same manner, and to have same effect as if the judgment or decree complained of rendered in United States court.

*Rev. Stats. sec. 1004.]* Writs of error returnable to Supreme Court may be issued by clerks of circuit court, or by clerk of Supreme Court, under seal, and when issued to be according to form heretofore transmitted to clerks of circuit courts.

*Rev. Stats. sec. 1011.]* No reversal in Supreme or circuit court for error in ruling any plea in abatement, except to jurisdiction, or for any error of fact.

*Rev. Stats. sec. 1012.]* Appeals from United States courts subject to same rules, &c., as writs of error.

*Rev. Stats. sec. 698.]* Upon appeal in equity, admiralty and prize causes, a transcript of the record, and copies of proofs and of such entries and papers on file as may be necessary to hearing, shall be transmitted to Supreme Court ; and Supreme Court or court below may order original documents or other evidence to be sent up, in addition to copy of record, or in lieu of copy or part thereof ; but no new evidence is received in Supreme Court except in admiralty and prize causes. (But as to admiralty causes, see Act Feb. 16, 1875, 18 Stat. L. 315, *post.*)

*Rev. Stats. sec. 750.]* In equity and admiralty causes, only the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court, etc., shall be entered on the final record. (But as to admiralty causes, see Act Feb. 16, 1875, 18 Stat. L. 315, *post.*)

*Act Feb. 16, 1875, sec. 1, 18 Stat. L. 315.]* In admiralty cases, the circuit courts shall find the facts and conclusions of law upon which judgment is rendered, and shall state the facts and conclusions of law separately, and, in finding facts, a jury of not less than five nor more than twelve may, upon consent, etc., be empaneled to render verdict, as in cases at common law, such verdict to be entered of record and to stand as the finding of court upon which judgment shall be entered; and the review of Supreme Court shall be limited to questions of law arising on record, and such rulings, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law.

*Same Act, sec. 2, same place.]* In patent causes, in equity, the circuit courts may, subject to such regulations as may be prescribed by the Supreme Court, empanel a jury of not less than five nor more than twelve, and submit to them such questions of fact as may be deemed expedient, and the verdict shall be treated and proceeded on the same as issues sent out of chancery.

*Rev. Stats. sec. 1005.]* Supreme Court may allow amendment of writ of error when mistake in teste of writ, or seal wanting, or writ returnable wrong day, or when defective statement of title of action or parties, if defect can be remedied by reference to accompanying record, and in all other particulars of form, provided defect has not prejudiced, and amendment will not injure, defendant in error.

*Rev. Stats. sec. 1006.]* Amendment of form or substance may be allowed by Supreme Court in prize causes. (See Rev. Stats. sec. 4636.)

*Rev. Stats. sec. 1008.]* Writ of error must be brought or appeal taken within two years from entry of judgment, decree or order, except in cases of infants, insane or imprisoned persons, when writ or appeal may be taken within two years, exclusive of term of disability. (See Rev. Stats. sec. 635.)

*Rev. Stats. sec. 1009.]* Appeals in prize causes must be taken within thirty days from rendering of decree, unless court previously extends time ; but Supreme Court may allow appeal if any notice or intention to appeal be filed with the clerk of the district court within such thirty days. (See Rev. Stats. secs. 695, 4636.)

**Decisions.**

Only final judgments can be reviewed in the Supreme Court. If anything remains to be done the judgment is not final, and a writ of error or appeal will not lie. *Rutherford v. Fisher*, 4 *Dall.* 22; *Boyle v. Zacharie*, 6 *Peters*, 648; *Callan v. May*, 2 *Black*, 541; *Gregg v. Forsyth*, 2 *Wall.* 56; *Sparrow v. Strong*, 3 *Id.* 103; *Baxter v. Forsyth*, 5 *Id.* 190.

But if the decision below disposes of the case, a review can be had notwithstanding a defect or irregularity in the judgment. *Wilson v. Daniell*, 3 *Dall.* 401; *N. O. v. Morgan*, 10 *Wall.* 256; *Rogers v. Burlington*, 3 *Id.* 654.

Where the dispute between the parties is terminated as to all the merits of the cause, and nothing remains but to carry the judgment or decree into execution, it is final for all the purposes of an appeal. *Winthrop Iron Co. v. Meeker*, 3 *Sup. Ct. Rep.* 111.

A writ of error may be amended by filling the blank left for the return day. *Mossman v. Higginson*, 4 *Dall.* 12.

The parties must be so described on the record as to show that the court has jurisdiction. *Ib.*

If the writ of error is not returned at the proper term it becomes a nullity. *Blair v. Miller*, 4 *Dall.* 21.

If a writ of error be served before the return day, it may be returned afterwards, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Wood v. Lide*, 4 *Cranch*, 180.

A return to a writ of error certified by the clerk of the court which pronounced the judgment, and authenticated by the seal of the court, is in conformity to law, and brings the record regularly before this court. *Worcester v. Georgia*, 6 *Peters*, 515.

A case cannot be heard upon a record containing only an agreed statement of facts, without any of the proceedings below except the judgment. *Keene v. Whittaker*, 13 *Peters*, 459.

A writ of error must be made returnable to the first day of the term. If made returnable at any subsequent day it is erroneous, and will be dismissed on motion. And in this respect it cannot be amended. *Ins. Co. v. Mordecai*, 21 *How.* 195; *Porter v. Foley*, *Id.* 393.

The writ of error, or the allowance of appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the writ is sued out or the appeal allowed; otherwise the writ of error or appeal becomes void, and the party desiring to invoke the appellate jurisdiction will be obliged to resort to a new writ or appeal. *U. S. v. Hoge*, 3 *How.* 534; *U. S. v. Vallobolos*, 6 *Id.* 90; *U. S. v. Curry*, *Id.* 112; *Steamer Virginia v. West*, 19 *Id.* 182; *Mesa v. U. S.*, 2 *Black*, 721; *Castro v. U. S.*, 3 *Wall.* 46.

A citation, with due return, or waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal. *Alviso v. U. S.*, 5 *Wall.* 824; *Bacon v. Hart*, 1 *Black*, 38; *Garrison v. Cass Co.*, 5 *Wall.* 823.

Cases cannot be brought within the appellate jurisdiction of this court

by agreement of the parties, and without an appeal allowed or writ of error served. *Washington Co. v. Durant*, 7 *Wall.* 694.

Though no citation appears in the record, it may be proved *aliunde*, that one was issued. *Innerarity v. Byrne*, 5 *How.* 295.

Where an inspection and comparison of written documents is material to the decision of a cause, this court will order the original papers to be sent up from the court below. *The Elsieur*, 1 *Wheaton*, 439.

Where a state court is composed of a chief justice and associates, writs of error to such court must be signed by the chief justice; and if signed by one of the associates only, it will be dismissed for want of jurisdiction. *Bartemeyer v. Iowa*, 14 *Wall.* 26.

All parties against whom a joint judgment or decree is rendered must join in the writ of error or appeal, or it will be dismissed, except sufficient cause for non-joinder be shown. *Williams v. Bank*, 11 *Wheaton*, 414; *Owings v. Kincannon*, 7 *Peters*, 399; *Masterson v. Herndon*, 10 *Wall.* 416; *The Protector*, 11 *Wall.* 82; *Hampton v. Rouse*, 13 *Id.* 187; *Simpson v. Greeley*, 20 *Wall.* 152.

Cases in equity are heard upon the proofs sent up with the record. No new evidence can be received in the Supreme Court, nor can the pleadings be amended. *Blease v. Garlington*, 92 *U. S.* 1; *Pacific R. R. Co. of Mo. v. Ketchum*, 95 *U. S.* 1.

An appeal, although allowed out of term, is not avoided by the non-service of a citation; but this court will impose such terms upon the appellant as, under the circumstances, may be legal and proper. *Dayton v. Lash*, 94 *U. S.* 112. (*Distinguishing Vallobolos v. U. S.*, 6 *How.* 90; *U. S. v. Curry*, *Id.* 112; *City of Washington v. Dennison*, 6 *Wall.* 496, *supra*.)

Where a writ of error is defective in the statement of the parties thereto, the right to amend is not absolute under sec. 1005, Rev. Stats.; but the court, in its discretion, may allow the requisite amendment to be made, upon such terms as it may deem just. *Pearson v. Yewdall*, 95 *U. S.* 294.

Unless allowed in open court during the term at which the decree was rendered, an appeal will be dismissed if no citation has been issued and the appellee does not appear. *Vansant v. Gas Light Co.*, 99 *U. S.* 213.

A writ of error made returnable to a day different from the return day fixed by statute as the day on which the term commences, will be dismissed. *Carroll v. Dorsey*, 20 *How.* 204; *Ins. Co. v. Mordecai*, 21 *Id.* 195; *Porter v. Foley*, *Id.* 393; *Agricultural Co. v. Pierce Co.*, 6 *Wall.* 246.

The return day of the writ of error may be amended, but the court will require a new citation to be issued and served. *Nat. Bank v. Bank of Commerce*, 99 *U. S.* 608.

For the purpose of an appeal to, or writ of error from, this court, the transcript of the record is sufficiently authenticated if it be sealed with the seal of the court below, and signed by the deputy clerk thereof in the name of and for his principal. *Garneau v. Dozier*, 100 *U. S.* 7.

Papers properly belonging to the files of a court should not be re-

moved therefrom except in cases of positive necessity. When, therefore, an appeal is taken, no order for the transmission of such papers ought to be made unless the actual inspection of them as originals is required to enable the appellate court to give them their full and just effect in the determination of the suit. *Craig v. Smith*, 100 U. S. 226.

Where, on an appeal, papers have been improperly sent here, the order of the court below will be closely examined, to determine whether they are included in its terms. *Ib.*

Where the record is not complete, or properly certified, the court may, in its discretion, allow further time to the appellant to supply such omissions, and in default thereof dismiss the cause. *R. R. Co. v. Schutte*, 100 U. S. 644.

A citation is not required where the appeal is taken and perfected in open court during the term at which the decree complained of is rendered. But the rule is otherwise where, at a subsequent term, the appeal is allowed, although the solicitors of the appellee be present. The court will not, however, dismiss the cause for the non-service of a citation in the latter case, but terms will be imposed upon the appellant and a citation be required. *R. R. Co. v. Blair*, 100 U. S. 661.

An appeal will be dismissed where it appears from the record, taken as a whole, that the amount actually in controversy is not sufficient to give this court jurisdiction. *Gray v. Blanchard*, 97 U. S. 121; *Banking Association v. Insurance Association*, 102 U. S. 121; *Parker v. Morrill*, 106 U. S. 1.

An appeal is the only mode by which the appellate jurisdiction of this court can be exercised in equity suits, brought in the courts of the United States, and it does not lie before a final decree has been rendered. *Hayes v. Fischer*, 102 U. S. 121.

Neither the charge of the court below, if no exception was taken thereto before the final submission of the case to the jury, nor the granting or refusing a new trial, is subject to review in the Supreme Court. *Railway Co. v. Heck*, 102 U. S. 120.

Where salvors united in a claim for a single salvage service, jointly rendered by them, the owner of the property is entitled to an appeal where the gross sum decreed is in excess of five thousand dollars, although the circuit court deemed it proper to apportion the recovery among the salvors, and on such apportionment less than that sum was awarded to each claimant. *The Connemara*, 103 U. S. 754.

A writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors, pursuant to the requirements of sec. 997, Rev. Stats. *School Dist. of Ackley v. Hall*, 106 U. S. 428. (See Sup. Ct. Rule 21, par. 4.)

The mere fact that the plaintiff in error had accepted the amount awarded in the decree brought up by writ of error does not estop him from prosecuting the writ of error and procuring a reversal of the decree. *U. S. v. Dashiell*, 3 Wall. 688; *Embry v. Palmer*, 2 Sup. Ct. Rep. 25.

No judgment or decree of a State court can be reviewed in the Supreme Court unless the writ of error is filed in the court which rendered

the judgment or decree within two years after the entry thereof. *Cummings v. Jones*, 104 U. S. 419; *Scarborough v. Pargond*, 2 *Sup. Ct. Rep.* 877.

The omission from a certificate of division of the words "upon the request of either party or their counsel," where neither party challenges the jurisdiction of this court, is not a fatal omission. *U. S. v. Harris*, 106 U. S. 629.

Where, in a case tried by the court below, the record does not affirmatively show a written stipulation waiving a jury, the questions decided at the trial cannot be re-examined in the Supreme Court on writ of error. *County of Madison v. Warren*, 106 U. S. 622.

In the case of a special finding in admiralty, with conclusions of law, the question is not whether the statement of facts made by the circuit court might be true as a conclusion of fact, but whether, upon the facts found, it must be true as matter of law. *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 1 *Sup. Ct. Rep.* 582.

In admiralty, distinct decrees in favor of or against distinct parties, growing out of the same transaction, cannot be joined to give this court jurisdiction. *Ex parte B. & O. R. R. Co.*, 106 U. S. 5.

The facts found by the circuit court in admiralty cases are conclusive upon the Supreme Court. The only question that can be considered is whether the facts found support the conclusions of law and the decree. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 U. S. 214; *The Adriatic*, 103 U. S. 730; *The Anie Lindsay*, 104 U. S. 185; *The Francis Wright*, 105 U. S. 381; *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 1 *Sup. Ct. Rep.* 582.

In order to justify this court in returning a cause in admiralty to the circuit court for the finding of facts required by the Act of Feb. 16, 1875 (18 *Stat. L.* 315, *supra*), it must appear that the omission to make such finding is attributable to the court, and not to the parties. *The S. S. Osborne*, 104 U. S. 183.

Decrees rendered in admiralty prior to the Act of 1875 (18 *Stat. L.* 315, *supra*) but not heard in the Supreme Court until after the act went into effect, will be determined according to the practice before the act was passed, and new evidence will be received. *The Richmond*, 103 U. S. 540.

Questions of fact cannot be re-examined on writs of error. *Miles v. U. S.*, 103 U. S. 304.

The Act of 1875 (18 *Stat. L.* 315, *supra*) relating to appeals in admiralty, does not vary the practice requiring the record transmitted to the Supreme Court to contain the testimony, etc., as required by admiralty rule 52. *The Alice Taintor*, 14 *Blatch.* 225.

Where the amount involved in an admiralty suit is not sufficient to permit a review by the Supreme Court, a general finding of facts is sufficient under the Act of 1875 (18 *Stat. L.* 315, *supra*). *1265 Vitrified Pipes*, 14 *Blatch.* 274.

If an appeal is allowed in open court and security taken, no citation is necessary; but if the security is not given until after the term is over,

a citation must be issued and served. *Sage v. R. R. Co.*, 96 U. S. 715 ; *Haskins v. St. L. & S. E. Railway Co.*, 3 Sup. Ct. Rep. 72.

If the writ of error is not made returnable on a particular day, the defendant is entitled to a dismissal, unless the court, on motion, grants leave to amend the defect. *Evans v. Brown*, 3 Sup. Ct. Rep. 83.

#### RULE IX.—Docketing Cases.

(1.) In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court within the first six days of the term ; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court within the first thirty days of the term ; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

(2.) But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court ; and if the case is docketed, and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter during the term, the case shall stand for argument at the term.

(3.) Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

(4.) In all cases where the period of thirty days is mentioned in this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana and Idaho.

See Sup. Ct. Rule 32.

First paragraph promulgated February Term, 1821, as original rule 32, 6 *Wheaton*, vi; republished as rule 29, 1 *Peters*, ix; amended January Term, 1835, 9 *Peters*, vii; again amended December Term, 1853, 16 *How.* ix; revised and made part of this rule, December Term, 1858, 21 *How.* viii. Second paragraph promulgated December Term, 1853, as part of original rule 63, 16 *How.* ix; revised and made part of this rule, December Term, 1858, 21 *How.* viii. Third paragraph promulgated December Term, 1867, 6 *Wall.* v; amended January 7, 1884. Fourth paragraph promulgated December Term, 1853, as part of rule 63, 16 *How.* ix; revised and made part of this rule, December Term 1858, 21 *How.* viii; amended March 10, 1855, 2 *Wall.* viii.

### Statutory Provisions.

*Rev. Stats. sec. 1013.]* Where appeal is duly taken by both parties from circuit or district court to Supreme Court, the transcript of record filed by either party may be used on both appeals, and both shall be heard as if records had been filed by each.

### Decisions.

The rule to dismiss a writ of error for not filing the record within the first six days of the term does not apply to cases where the transcript shall have been filed at any time before the motion to dismiss. *Bingham v. Morris*, 6 *Cranch*, 99; *Pickett v. Legerwood*, 7 *Peters*, 144.

The rule as to dismissing causes for failure to file the record applies to admiralty suits. *The Jonquille*, 6 *Wheaton*, 452.

After an appeal has been dismissed for informality in prosecuting it a party may have another appeal, provided the limitation to appeal has not expired. *Yeaton v. Lenox*, 8 *Peters*, 123; *Steamer Virginia v. West*, 19 *How.* 182.

Where a motion to docket the cause is made after default, under this rule, and simultaneously a motion to docket and dismiss is made by the defendant in error, the court will allow the case to be docketed, and not dismissed. *Owings v. Tiernan*, 10 *Peters*, 24.

The defendant in error cannot have the case docketed and dismissed without producing the certificate of the clerk of the court below, although a transcript of the record has been lodged with the clerk of this court by the plaintiff in error. *West v. Brashear*, 12 *Peters*, 101; *McComb v. Armstead*, 10 *Id.* 407.

The production of the original writ of error and citation is sufficient, on a motion to docket and dismiss, without a certificate of the clerk of the court below. *Amis v. Pearle*, 15 *Peters*, 211.

A judgment of dismissal is *nisi* only, during the term, and in the exercise of a sound discretion the court may, and, unless injurious to some substantial right of the defendant, will, reinstate the case. *Gwin v. Breedlove*, 15 *Peters*, 284.

A cause cannot be docketed and dismissed upon the certificate of the clerk of the court below unless all the names of the parties to the record are distinctly set forth. *Holliday v. Batson*, 4 *How.* 645; *Smith v. Clark*, 12 *How.* 21.

Where the record is not filed by the appellant within the time prescribed by the rules of this court, and the appellee files a copy of it, the appeal will be dismissed on his motion. *United States v. Fremont*, 18 *How.* 30.

The motion to dismiss for the want of jurisdiction, and the motion to dismiss for the want of prosecution, are different and distinct in their character; the one only dismisses the appeal and allows a second, but the other bars it. *Ib.* (See also *Castro v. U. S.*, 3 *Wall.* 46.)

A certificate of the clerk of the court below that he cannot make out the record in time to enable the plaintiff in error to comply with this rule is not a sufficient cause for an extension of time within which to do so. *Sturgess v. Harold*, 18 *How.* 40.

If an appeal is taken after the commencement of the term of the Supreme Court, the appellant is not bound to file the record until the next term. *Stafford v. Union Bank of La.*, 16 *How.* 135.

When an appeal has been docketed and dismissed, the same cannot again be docketed without a new appeal. *Rogers v. Law*, 21 *How.* 526.

An appeal must be prosecuted by filing the record within the term next after the appeal is taken; otherwise it will be dismissed. *Misa v. U. S.*, 2 *Black*, 721; *Castro v. U. S.*, 3 *Wall.* 46.

The practice is for the clerk to enter the appearance of the attorney-general without special direction in every case in which the United States is a party. *Brown v. U. S.*, 3 *Peters*, 459.

As the appellant whose appeal has been dismissed for not filing a transcript of the record has the whole term within which to file it and move to reinstate the cause, the clerk cannot give a certificate of dismissal during the term. *Bank of the United States v. Swan*, 3 *Peters*, 68.

To docket and dismiss a cause under this rule, it must appear from the certificate of the clerk of the court below that the judgment or decree was rendered thirty days before the first day of the next term of this court. *Rhodes v. Steamship Galveston*, 10 *How.* 144.

A plaintiff in error cannot be compelled to file the record. The court can only dismiss the cause in case of default. *Boyd v. Scott*, 11 *How.* 292.

A motion to docket and dismiss, when granted, is not an affirmance of the judgment below. It remits the cause to the lower court for proceedings to carry the judgment into effect. *U. S. v. Gomez*, 23 *How.* 326.

If it afterwards appears that no appeal had been taken when proceedings to docket and dismiss were had, the court will rescind the order of dismissal and revoke the mandate. *Ib.*

If no motion to dismiss be previously made, the record may be filed and the cause docketed at any time within the term. *Sparrow v. Strong*, 3 *Wall.* 97.

An appeal from California will be dismissed if the record is not filed within the first sixty days of the next term. *German v. U. S.*, 5 *Wall.* 825.

An appeal or writ of error which does not bring to this court a transcript of the record before the expiration of the term to which it is returnable is no longer valid. *Edmonson v. Bloomshire*, 7 *Wall.* 306.

Where the United States is a party, delay in filing record may be excused where the Government is obliged to trust conduct of cases in remote parts of country to subordinate agents. *U. S. v. Vigil*, 10 *Wall.* 423.

An appeal will be dismissed where, at the term to which it is returnable, the transcript was, through laches of appellant, not filed, or cause docketed in this court. Appellee may move to dismiss at any time before hearing, or court may dismiss of its own motion. *Grigsley v. Purcell*, 99 *U. S.* 505.

Counsel who enter their appearance under this rule will be held responsible for all that such entry implies until they are relieved by substitution, or otherwise. *Alvord v. U. S.*, 99 *U. S.* 594.

Where a return was duly made to a writ of error, and a transcript of the record lodged in clerk's office, and a citation had been issued and served in time, but the cause was not docketed nor fee bond given until about a year afterwards, *Held*, as no motion to dismiss had been meantime made, a motion at present term must be denied. *Edwards v. U. S.*, 102 *U. S.* 575.

**RULE X.—*Security for Clerk's fees.—Printing Records.—Attachment for Clerk's fees.***

(1.) In all cases the plaintiff in error or appellant, on docketing a case, and filing the record, shall enter into an undertaking to the clerk, with <sup>Security for clerk's fees.</sup> surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

(2.) The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

(3.) Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record <sup>Estimate and payment of cost of printing.</sup> shall be printed, under his supervision, for <sup>25 copies to be printed.</sup> the use of the court and of counsel.

(4.) In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printing. printer. But the clerk shall cause copies to

be made for the printer of such original papers, sent up under Rnle 8, Section 4, as are necessary to be printed ; and of the whole record in cases of original jurisdiction.

(5.) The clerk shall supervise the printing, and see that the Clerk to supervise and printed copy is properly indexed. He shall distribute. distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

(6.) If the actual cost of printing the record, together with Refund of advance. the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

(7.) In case of reversal, affirmance, or dismissal, with costs, Cost to be taxed. the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

(8.) Upon the clerk's producing satisfactory evidence, by Attachment for Clerk's affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

See Sup. Ct. Rules 1, 11, 24, 32.

First paragraph promulgated February Term, 1808, 4 Cranch, 537; republished 1 Wheaton, xvii; again republished 1 Peters, viii; amended January Term, 1831, 5 Peters, viii (see that vol., p. 724); revised and made part of this rule, December Term, 1858, 21 How. viii; amended May 8, 1876, 91 U. S. vii. Second, third, fourth, fifth, sixth and seventh paragraphs promulgated January 7, 1884. Eighth paragraph promulgated February Term, 1808, 4 Cranch, 537; republished, 1 Wheat. xviii, and 1 Peters, viii; revised, and made part of this rule, December Term, 1858, 21 How. ix.

#### Statutory Provisions.

*Act Mar. 3, 1877, 19 Stat. L. 344.]* There shall be taxed against the losing party, in the Supreme Court and the Court of Claims, the cost of printing the record, to be collected by the clerk and paid into the treasury.

**Decisions.**

Each party, whether plaintiff or defendant, is liable for the clerk's fees due from each respectively, and an attachment may issue against either. *Caldwell v. Jackson*, 7 *Cranch*, 276.

The clerk may refuse to docket a cause if no fee bond is filed or he is not otherwise satisfied by the party as to the payment of his fees; and the cause will be dismissed if this requirement is not fulfilled. *Owings v. Tiernan*, 10 *Peters*, 447; *West v. Brashear*, 12 *Id.* 401; *Van Rensselaer v. Watt*, 7 *How.* 784.

Where the court has no jurisdiction of a cause it cannot award costs, or order execution for them to issue. *The Mayor v. Cooper*, 6 *Wall.* 247.

Where, by reason of the failure of the appellant to enter into an undertaking to the clerk for the payment of his fees, or otherwise satisfy him in that behalf, the appeal has, upon motion of the appellee, been docketed and dismissed, the court will not, on motion of the appellant, at a subsequent term, set aside the order of dismissal and grant leave to file the record and docket the cause. *Selma and Meriden R. R. Co. v. Louisiana Nat. Bk. of N. O.*, 94 *U. S.* 253.

The clerk may, for his protection, demand that his fees be paid in advance. *Stever v. Rickman*, 3 *Sup. Ct. Rep.* 67.

If the party prosecuting the cause fails, after demand, to pay the clerk's fees in time to enable him to cause the record to be printed in due season, the writ of error or appeal will be dismissed for want of prosecution, unless sufficient cause be shown to the contrary. *Ib.*

(See *in re* amendments to rules 1 and 10, 1 *Sup. Ct. Rep.* 125.)

**RULE XI.—*Translations.***

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

Translations to be made  
of documents, etc. in  
foreign language.

Promulgated December Term, 1851, as original rule 60, 12 *How. xi*; revised and made rule 11, December Term, 1858, 21 *How. ix.*

**RULE XII.—*Further proof.***

(1.) In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a

Further proof by deposition, to be issued from this court, or from any circuit court of the United States.

(2.) In all cases of admiralty and maritime jurisdiction, in admiralty and maritime cases. where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories, within twenty days from the service of such notice: *Provided, however,*

Oral testimony. *ever,* That nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

First paragraph promulgated February Term, 1816, as original rule 25, 1 Wheaton, xix; republished as rule 24, 1 Peters, viii; revised and made part of rule 12, December Term, 1838, 21 How. ix. Second paragraph promulgated February Term, 1817, 2 Wheaton, vii; republished as rule 26, 1 Peters, ix; revised and made part of this rule December Term, 1858, 21 How. x.

#### Statutory Provisions.

*Rev. Stats.* sec. 698.] On appeals in equity and admiralty, and in prize cases, a transcript of the record, copies of proofs, and of entries and papers necessary, shall be transmitted to Supreme Court, and original papers may be ordered to be transmitted also. On such appeals no new evidence shall be received except in admiralty and prize causes (*Note.—*No new evidence can now be received in admiralty causes on the instance side of the court. See Act Feb. 16, 1875, 18 Stat. L. 315, *post.*)

*Rev. Stats.* sec. 862.] The mode of proof in equity and admiralty causes shall be according to rules prescribed by the Supreme Court.

*Rev. Stats.* sec. 917.] Supreme Court may regulate the taking and obtaining of evidence in equity and admiralty, in the circuit and district courts.

*Act Feb. 16, 1875, sec. 1, 18 Stat. L. 315.]* The circuit courts, in admiralty causes, on the instance side, shall separately find the facts and conclusions of law, and the review of the Supreme Court shall be limited to questions of law arising on the record, and to rulings duly excepted to and presented by a bill of exceptions.

*Same Act, sec. 2, same place.]* In patent causes in equity, circuit courts may submit any question of fact to a jury of not less than five nor more than twelve, whose verdict shall have the same effect as in cases of issues out of chancery.

(Construed, *Watt v. Starke*, 101 U. S. 247.)

**Decisions.**

This court will grant a commission to take new evidence to be used here in cases of violation of embargo. *Hawthorne v. United States*, 7 *Cranch*, 107.

It is not a matter of course to make an order for further proof in this court in a prize cause, and such order will not be made when there is reason to believe the applicant has suppressed important evidence. The *St. Lawrence*, 8 *Cranch*, 434.

But the rule is otherwise when the evidence not produced in the court below is shown to support the applicant's title, and there is no reason to suppose it was kept back unfairly in the court below. *Ib.*

Further proof inconsistent with that already in the case will be refused. *The Euphrates*, 8 *Cranch*, 385.

When it did not distinctly appear that enough had been done to amount to a capture, an order for further proof was made by the court, *sua sponte*. *The Grotius*, 8 *Cranch*, 456. See, also, *The Adeline*, 9 *Cranch*, 244; *The Samuel*, 1 *Wheaton*, 9; *The Fortuna*, 3 *Wheaton*, 236; *The Atalanta*, 3 *Wheaton*, 409.

When merits plainly appear, it is the settled practice of this court in admiralty to allow a new allegation to be filed, and for this purpose to remand the cause to the circuit court. *The Adeline*, 9 *Cranch*, 244.

New evidence offered in this court is open to all legal objections. *The Samuel*, 1 *Wheaton*, 9.

If the parties have been guilty of fraud, misconduct, or illegality, in a prize cause, further proof will not be allowed. *The Dos Hermanos*, 2 *Wheaton*, 76.

Parties who have had the benefit of plenary proof in the court below cannot have an order for further proof here except under very special circumstances. *Ib.*

It is the practice of this court, in prize cases, to hear the cause in the first instance upon the evidence transmitted by the circuit court, and to decide upon that evidence whether it is proper to allow further proof. *The London Packet*, 2 *Wheaton*, 371.

Depositions to be used as further proof in this court must be taken under a commission. *Ib.*

Depositions taken as further proof in one prize cause cannot be invoked in another. *The Experiment*, 4 *Wheaton*, 84.

In cases of original jurisdiction, in equity, where a State is a party, it may be referred to a commissioner to take proof. *Pa. v. Wheeling and Belmont Bridge Co.*, 9 *How.* 647; *Florida v. Georgia*, 17 *How.* 478.

Where it appeared that witnesses in the court below had been corrupted, the court ordered a commission to take testimony as to that fact. *The Western Metropolis*, 12 *Wall.* 389.

This court cannot, after an appeal in equity, receive new evidence; nor can it on motion set aside a decree of the court below and grant a rehearing. *Roemer v. Simon*, 91 *U. S.* 149.

Cases in equity on appeal are heard upon the proofs sent up with the

record. No new evidence can be received. *Blease v. Garlington*, 92 U. S. 1.

Since the passage of the act of Feb. 16, 1875 (*supra*), the findings of fact in admiralty causes by the circuit court, on the instance side, are conclusive, and the review of the Supreme Court is limited to questions of law. The case stands precisely as if the facts had been found by the verdict of a jury. No new evidence can, therefore, be received. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 U. S. 214; *The Adriatic*, 103 U. S. 730; *The Annie Lindsley*, 104 U. S. 185; *The Francis Wright*, 105 U. S. 391.

#### RULE XIII.—*Objections to evidence in the record.*

In all cases of equity or admiralty jurisdiction, heard Objections to deposition, in this court, no objection shall hereafter be allowed to be taken to the admissibility and admiralty causes, of any deposition, deed, grant, or other exhibit, found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Promulgated February Term, 1824, 9 Wheaton, iv; republished as rule 32, 1 Peters, x; revised and made rule 13, December Term, 1858, 21 How. x.

#### Decisions.

Unless objection is made to evidence in the court below, it will be presumed to have been admitted by consent. *The Pizarro*, 2 Wheaton, 237.

A party should be confined by a court of errors to the specific objection to evidence taken at the trial below. *Hinde v. Longworth*, 11 Wheaton, 199.

Technical objections not brought to the notice of the court below will be disregarded on appeal. *Harrison v. Nixon*, 9 Peters, 483.

This court will examine a deed not put in evidence below when the parties consent. *Boone v. Chilis*, 10 Peters, 177.

Where a deed was objected to in the court below on the ground of fraud, but no specific grounds of objection were made, this court cannot inquire into the correctness of the objection. *Thomas v. Lawson*, 21 How. 331.

Where none of the evidence is objected to below, and no exception taken to the findings, objection cannot be made in this court. *R. R. Co. v. Lindsay*, 4 Wall. 650.

#### RULE XIV.—*Certiorari for diminution of the record.*

No certiorari for diminution of the record will be hereafter awarded in any case unless a motion is made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for

such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay. Motions for, when to be made.

Promulgated February Term, 1824, 9 Wheaton, iv; republished as rule 31, 1 Peters, x; revised and made rule 14, December Term, 1858, 21 How. x.

#### Statutory Provisions.

*Rev. Stats. sec. 713.]* The Supreme, circuit and district courts may issue writs of scire facias, and all writs not specifically provided for by statuté, necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

#### Decisions.

The clerk of the court to which a certiorari is directed should make return to the same under his hand and the seal of the court. *Fenemore v. United States*, 3 *Dall.* 360, note.

The return need not be made by the judge. *Stewart v. Ingle*, 9 *Wheaton*, 526.

A certiorari will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record. *Field v. Milton*, 3 *Cranck*, 514.

Where the record omits a part of the charge of the judge embraced in an exception, the plaintiff in error may obtain a certiorari upon producing a properly certified copy of the exception. *Stimson v. Westchester R. R. Co.*, 3 *How.* 553.

Where there appears to be an omission in the record of an important paper, which may be necessary for a correct decision of the case of the defendant in error who has no counsel in court, the court will, of its own motion, order the case to be continued and a certiorari to be issued to bring up the missing paper. *Morgan v. Curtenins*, 19 *How.* 8.

The court will award a certiorari when diminution of the record is suggested, even at the third term, if the delay be accounted for; but the hearing will not be postponed. *Clark v. Hackett*, 1 *Black*, 77.

If a party is dissatisfied with the record as returned by the clerk, he has his remedy by certiorari. *U. S. v. Gomez*, 1 *Wall.* 690.

On a mere petition for a certiorari, the court, according to its regular and better practice, will decline to hear the case on its merits, even though the counsel for the petitioner produce a copy of the record admitted on the other side to be a true one. It will wait for a return, in form, from the court below. *Ex parte Dugan*, 2 *Wall.* 134.

A writ of error should be directed to the court rendering final judgment and in which the record remains, although it may not be the highest court of the State, and although a higher court may have exercised a revisory jurisdiction over points in the case, and certified its decision to the court below. And the omission in the record of these matters and the action of the higher court upon them, does not make a case for a certiorari on account of diminution. *McGuire v. The Commonwealth*, 3 *Wall.* 383.

It being made to appear, by a certificate of the clerk of the circuit court that there was a clerical error in the transcript of the record returned to this court, the error was allowed to be amended here without returning the transcript to the court below, and without a certiorari. *Woodward v. Brown*, 1 *Peters*, 1.

A certiorari for diminution of the record was allowed under special circumstances, and where the cause had been continued until the next term, although the motion for it was made after more than one term had passed since the entry of the case, and contrary to a rule of the court. *Stearns v. U. S.*, 4 *Wall*. 1.

The writ of certiorari, being properly used to bring up outbranches of the record or other documents or writings omitted, is not properly asked where it is desired to have the Court of Claims supply certain supposed defects in its conclusions deducible from the evidence before it. *U. S. v. Adams*, 9 *Wall*. 661.

Where the only defect in a transcript sent to this court is that the clerk has not appended to it his certificate that it contains the full record, a certiorari is not the proper remedy for relief to the plaintiff in error. Leave should be asked to withdraw the transcript in order that the clerk below may append his certificate. *Hodges v. Vaughan*, 19 *Wall*. 12.

On an allegation of deficiency in the record, the deficiency, if any, may be supplied by certiorari. A motion to dismiss on such an allegation will be denied. *The Rio Grande*, 19 *Wall*. 178; *Missouri, K. & T. Railway Co. v. Dinsmore*, 2 *Sup. Ct. Rep.* 9.

If the Court of Claims grants a new trial pending an appeal to this court, it vacates the judgment and resumes control of the case and the parties, and no certiorari will be granted to compel that court to send here proceedings subsequent to the appeal. *U. S. v. Young*, 94 *U. S.* 258.

A cause in admiralty will not be returned to the court below for the finding of facts required by the act of Feb. 16, 1875 (18 Stat. L. 315), unless it appears that the omission to make such finding is attributable to the court, and not to the parties. *The S. S. Osborne*, 104 *U. S.* 183.

Although upon the face of the decree it appears that the case was disposed of on demurrer to the bill, and, therefore, the evidence is not necessary for a hearing in this court, a certiorari may be granted where the record has not been printed, and the parties do not agree in their statements of what it contains. *Missouri, K. & T. Railway Co. v. Dinsmore*, 2 *Sup. Ct. Rep.* 9.

#### RULE XV.—*Proceedings on death of a party.*

(1.) Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personality or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become

Death of party ; representatives to be admitted, etc.

parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed if it be erroneous: Provided, however, that a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory or District, from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

(2.) When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next <sup>Abatement of case.</sup> succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

(3.) When either party to a suit in a circuit court of the United States shall desire to prosecute a writ <sup>Death of party before writ of error or appeal.</sup> of error or appeal to the Supreme Court of the United States, from any final judgment or decree, rendered in the said circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit

could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: Provided, however, that a proper citation, reciting the substance of such Citation to representative. order, shall be served upon such representative,

either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing: And provided, also, that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

See Equity Rule 56.

First paragraph promulgated February Term, 1821, as original rule 31, 6 Wheaton, v; republished as rule 28, 1 Peters, ix; revised and made part of rule 15, December Term, 1858, 21 How. x; amended December 11, 1879, 100 U. S. ix; amended Jan. 7, 1884. Second paragraph promulgated December Term, 1851, as original rule 61, 13 How. v; revised and made part of this rule, December Term, 1858, 21 How. xi. Third paragraph promulgated January 12, 1875, 13 Wall. xv.

**Statutory Provisions.**

*Rev. Stats. sec. 955.]* When either party to a suit in any court of the United States dies before final judgment, his executor or administrator may, if the cause of action survives, prosecute or defend the suit to final judgment. If such executor or administrator, upon service of a scire facias twenty days beforehand, neglects or refuses to become a party, judgment may be rendered as if he had voluntarily made himself a party. The executor or administrator becoming a party may, upon application, obtain a continuance until the next term.

*Rev. Stats. sec. 956.]* If one of two or more parties on the same side in a cause which survives to or against the other party or parties dies, the action shall not abate; but, such death being suggested upon the

record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant.

*Act Mar. 3, 1875, sec. 10, 18 Stat. L. 470.]* Whenever either party to a final judgment or decree rendered in a circuit court has died or shall die before the time allowed for taking a writ of error or appeal has expired, it shall not be necessary to revive the suit by any formal proceedings. The representative of the deceased party may file in the office of the clerk a duly certified copy of his appointment, and thereupon may enter an appeal or writ of error as the party he represents might have done. If the party in whose favor judgment or decree is rendered has died before writ of error or appeal, notice to his representative shall be given from the Supreme Court, as provided in case of death of a party after writ of error or appeal.

#### Decisions.

This rule applies to real as well as personal actions. *Green v. Watkins*, 6 *Wheaton*, 260.

In a real action the defendant cannot prosecute the suit against the heir of the tenant who dies before judgment; and if judgment is rendered against the heir, he may reverse it by writ of error, though he did not assign for error in the court below that the suit was abated. *Macker v. Thomas*, 7 *Wheaton*, 530.

If one of two plaintiffs in error dies, the action still survives. *McKinley v. Carroll*, 12 *Peters*, 66.

An executor or administrator of a deceased party has power to prosecute or defend an action by or against the deceased, without regard to his own citizenship. *Clarke v. Mathewson*, 12 *Peters*, 164.

If one defendant in error die before the term begins, and the cause of action survives, the death may be suggested, and judgment taken against the survivor. *McNutt v. Bland*, 2 *How.* 9.

If new parties are not made after the death of the plaintiff in error is suggested, the writ of error will abate and the cause be remanded. *Phillips v. Preston*, 11 *How.* 294; *Barribeau v. Brant*, 17 *How.* 43.

Upon the death of a party, only his legal representatives can revive the suit. An assignee cannot appear. *Barribeau v. Brant*, 17 *How.* 43.

A judgment cannot be executed without the bringing in of the representative, even where the defendant dies after the recovery of the judgment. *Mitchell v. St. Maxent's Lessec*, 4 *Wall.* 237.

Where, pending a writ of error to this court, subsequently dismissed, the defendant in error dies, and the other side wishes to take a new writ, application should be made to the court below for the purpose of reviving the suit in the name of the representative of the deceased. A writ of error can then regularly issue. A motion in this court to revive the writ by suggesting the death and substituting the representatives as parties to the record is not regular. *McLane v. Boon*, 6 *Wall.* 244. (But see *Act Mar. 3, 1875, sec. 10, 18 Stat. L. 470, supra.*)

If the court below should refuse an application such as that above contemplated, in the circumstances mentioned, then the writ may, from

necessity, issue in the name of the representatives, in the usual way, serving on them the citation to appear at the next term. *McLane v. Boon*, 6 *Wall.*

The death of a claimant in a cause *in rem*, in admiralty, does not abate the suit nor render a subsequent decree therein erroneous, although the claimant's representatives are not substituted. *Penhollow v. Doane's Admr.*, 3 *Dallas*, 54; *The James A. Wright*, 10 *Blatch.* 160. See *The Ship Norway*, 1 *Ben.* 493.

#### RULE XVI.—*No appearance of plaintiff.*

Where no counsel appears and no brief has been filed for Where no appearance the plaintiff in error or appellant, when the for plaintiff case dismissed or affirmed. case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

See Sup. Ct. Rule 20, paragraph 2.

Promulgated February Term, 1806, but, owing to the omission of the clerk to enter with the other rules, was not published in the reports until 3 Peters, xiii; revised and made rule 16, December Term, 1868. 21 How. xi; amended Jan. 7, 1884.

#### Decisions.

The practice is for the clerk to enter the appearance of the Attorney General in all cases in which the Government is a party, without any special notice to that effect. *Ferra v. U. S.*, 3 *Peters*, 459.

Where the counsel for the plaintiff in error withdraws his appearance, the defendant in error has the right either to have the plaintiff called and the suit dismissed, or to open the record and pray an affirmation. *McGuire v. The Commonwealth*, 3 *Wall.* 382.

When a cause, reached in its regular order on the docket, has, under this rule, been dismissed by reason of the appellant's non-appearance, for which no just cause existed, it will not, over the objection of the appellee, be reinstated. *Hurley v. Jones*, 97 *U. S.* 318.

An appeal dismissed under this rule will not be reinstated unless good cause therefor be shown. *James v. McCormick*, 105 *U. S.* 265.

#### RULE XVII.—*No appearance of defendant.*

Where the defendant fails to appear when the case is Where no appearance called for trial, the court may proceed to for defendant case to proceed ex parte. hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

See Sup. Ct. Rule 20, paragraph 2.

Promulgated December 9, 1801, 1 *Cranch*, xviii; republished 1 *Wheaton*, xvi; again republished 1 *Peters*, vii; revised, corrected, and made rule 17, December Term, 1858, 21 *How. xi.*

#### Decisions.

Further time may be given for the appearance of a State. *Oswald v. New York*, 2 *Dall.* 415.

A defendant State may obtain leave to withdraw its appearance. Mass. v. R. I., 12 Peters, 755.

### RULE XVIII.—*No appearance of either party.*

When a case is reached in the regular call of the docket, and there is no appearance for either party, the ease shall be dismissed at the cost of the plaintiff. When neither party appears, case dismissed at cost of plaintiff.

See Supreme Ct. Rule 20, paragraph 2.

Promulgated December Term, 1849, as original rule 54, 8 How. v.; amended by original rule 59, December Term, 1851, 12 How. xi; revised, corrected and made rule 18, December Term, 1858, 21 How. xi; amended Jan. 7, 1884.

### **Practice.**

If the counsel on neither side appear when the cause is called, the writ of error will be dismissed. Radford v. Craig, 5 Cranch, 289.

### RULE XIX.—*Neither party ready at second term.*

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement. When neither party ready at second term, case dismissed at cost of plaintiff.

Promulgated December Term, 1849, as original rule 55, 8 How. vi; revised and made rule 19, December Term, 1858, 21 How. xii.

### RULE XX.—*Printed arguments.*

(1.) In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same, within the first ninety days of the term; but twenty-five copies of the arguments, signed by attorneys or counselors of this court, must be first filed. Printed arguments may be submitted, before case reached on calendar.

(2.) When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel. Printed arguments when case reached; appearance.

(3.) When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court When case argued orally on behalf of one party, printed argument must be filed before argument begins.

will proceed to consider and decide the case upon the *ex parte* argument.

(4.) No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

No brief received after case argued, except by leave of court.

First paragraph promulgated January Term, 1833, as original rule 40, 7 Peters, iv; amended January Term, 1842, 16 Peters, viii; again amended January Term, 1845, 3 How. vi; revised, corrected and made part of rule 20, December Term, 1858, 2 How. xii; again amended March 10, 1865, 2 Wall. viii; again amended December Term, 1865, 3 Wall. viii; again amended March 3, 1875, 21 Wall. v; again amended Jan. 7, 1884. Second paragraph promulgated on revision of the rules, December Term, 1858, 21 How. xii. Third paragraph promulgated December Term, 1850, as original rule 58, 10 How. v; revised and made part of this rule, December Term, 1858, 21 How. xii. Fourth paragraph promulgated December 14, 1874, 20 Wall. xvi.

#### Decisions.

The submission of a cause under this rule was set aside because of non-compliance with rule 21, providing for the printing of State statutes when cited, the court at the same time announcing its determination to insist upon a strict observance of all rules intended to facilitate the examination of causes. *School District v. Insurance Co.*, 101 U. S. 472.

Under the circumstances of this case, the court declines to accept the submission of the cause against the wishes of those who, being collaterally interested in the decision which may be made, united in the employment of counsel to present their defense, and contributed to a common fund for the payment of the expenses of the litigation. *Smelting Co. v. Kemp*, 103 U. S. 666.

#### RULE XXI.—*Briefs.*

(1.) The counsel for the plaintiff in error or appellant shall 25 printed copies of file with the clerk of the court, at least six brief for plaintiff or days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

(2.) This brief shall contain, in the order here stated—

*a.* A concise abstract, or statement of the case, presenting succinctly the questions involved and Abstract of case. the manner in which they are raised.

*b.* A specification of the errors relied upon, which, in Specification of errors. cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases

brought up by appeal the specification shall state as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, referred to <sup>Full substance of evidence.</sup> the specification shall set out the part Charge of court to be set out. given or instructions refused. When the error alleged is to a ruling upon the report of a master, referred to <sup>Charge of court to be set out.</sup> the specification shall state the exception to the report and the action of the court upon it.

c. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

(3.) The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

(4.) When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court ; and errors not specified according to this rule will be disregarded ; but the court, at its option, may notice a plain error not assigned or specified.

(5.) When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion ; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

(6.) When no counsel appears for one of the parties, and  
When only one counsel no printed brief or argument is filed, only  
heard. one counsel will be heard for the adverse  
party; but if a printed brief or argument is filed, the adverse  
party will be entitled to be heard by two counsel.

First paragraph promulgated February Term, 1821, as original rule 30, 6 Wheaton, v.; republished as rule 27, 1 Peters, ix; amended by rule 53, December Term, 1849, 8 How. v.; revised and made part of this rule, December Term, 1858, 21 How. xiii; amended February 9, 1865, 2 Wall. vii; republished May 1, 1871, 11 Wall. ix; amended November 16, 1872, 14 Wall. xi; again amended January 7, 1884. Second paragraph, including subdivisions *a*, *b*, and *c*, promulgated November 16, 1872, 14 Wall. xi; revised and corrected January 7, 1884. Third, fourth and fifth paragraphs revise and correct the rule as promulgated May 1, 1871, 11 Wall. ix, and amended November 16, 1872, 14 Wall. xii. The last revision and correction was announced by the court January 7, 1884.

#### Decisions.

As a general rule, where the United States is a party and is represented by the Attorney-General, or his assistant, or by special counsel, no counsel can be heard in opposition on behalf of any other of the departments of the Government; but the circumstances of this case being special, the rule was departed from in this instance. *The Gray Jacket*, 5 Wall. 370.

Cases will be dismissed if the briefs required are not in strict conformity to this rule. *Portland Co. v. United States*, 15 Wall. 1.

The court will disregard errors not assigned according to this rule. *Deitch v. Wiggins*, 15 Wall. 539.

A judgment affirmed because the plaintiff in error had filed no assignment of errors or brief as required by the rules. *Ryan v. Koch*, 17 Wall. 19.

An assignment of error which alleges simply that the court below erred in giving the instructions which were given to the jury in lieu of the instructions asked for—it not being stated in what the error consisted or in what part of the charge it is—is an insufficient assignment under this rule. *Lucas v. Brooks*, 18 Wall. 436.

A plaintiff in error cannot take advantage of exceptions in his own favor, nor can a statement of facts signed by counsel be noticed upon error. *Bethell v. Mathews*, 13 Wall. 1.

A judgment affirmed for want of such an assignment of errors, as required by this rule, there being in the record no plain error not assigned and such as the court could notice without a proper assignment. *Treat v. Jamison*, 20 Wall. 652.

Whether a general assignment of errors that the judgment below on a special case was for the wrong party is sufficient, *quære*. *Scholey v. Rew*, 23 Wall. 331.

Fifty-two assignments of error having been filed in this case, the court condemns such a practice as a flagrant perversion of the rule on that subject. *Phillips and Colby Construction Co. v. Seymour*, 91 U. S. 646.

The submission of a cause under rule 20 was set aside for non-com-

pliance with that part of this rule requiring the printing of State statutes when cited. *School District v. Insurance Co.*, 101 U. S. 472.

Although sec. 997, Rev. Stats. provides that an assignment of errors shall be annexed to and returned with the writ of error, the practice is not to do so, but an assignment in accordance with this rule will be deemed sufficient. *School District of Ackley v. Hall*, 106 U. S. 428.

If there is no assignment of error, the case may either be dismissed on motion, or the record may be opened and an affirmance prayed. *Maxwell v. Stewart*, 21 Wall. 72.

#### RULE XXII.—*Oral Arguments.*

(1.) The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

(2.) Only two counsel will be heard for each party on the argument of a case. Two counsel.

(3.) Two hours on each side will be allowed for the argument and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion : Provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

First paragraph promulgated on revision of the rules at December Term, 1858, 21 How. xiii. Second paragraph promulgated February Term, 1812, as original rule 23, 1 Wheaton, xviii ; republished 1 Peters, 9 ; revised and made part of rule 21, December Term, 1858, 21 How. xii ; again republished May 1, 1871, 11 Wall. ix ; again republished November 16, 1872, 14 Wall. 11 ; again republished and made part of this rule January 7, 1884. Third paragraph promulgated December Term, 1849, as original rule 53, 8 How. v ; revised and made part of rule 21, December Term, 1858, 21 How. xii ; amended May 1, 1871, 11 Wall. ix ; republished November 16, 1872, 14 Wall. xi; revised and made part of this rule, January 7, 1884.

#### RULE XXIII.—*Interest.*

(1.) In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered. Interest where judgment affirmed on writ of error.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

Where writ of error taken for delay, damages to be awarded.  
3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered.

Same rule in equity, unless otherwise ordered by this court.  
4. In cases in admiralty, interest shall not be allowed unless specially directed by the court.

No interest in admiralty cases, unless, etc.  
First paragraph promulgated as original rule 62, December Term, 1851, 13 How. v.; revised and made part of rule 23, December Term, 1858, 21 How. xiii. Second paragraph promulgated February Term, 1803, as original rules 17 and 18, 1 Craneb, xvii; republished, 1 Peters, xxiv; again republished, 1 Wheaton, xvii; revised, corrected and made part of this rule, December Term, 1858, 21 How. xiii; amended May 1, 1871, 11 Wall. x. Third paragraph promulgated as original rule 62, December Term, 1851, 3 How. v; revised and made part of this rule, December Term, 1858, 21 How. xiii. Fourth paragraph promulgated January 7, 1884.

#### Statutory Provisions.

*Rev. Stats. sec. 966.]* Interest allowed on all judgments in civil causes in circuit and district courts, to be levied with execution of judgment, in cases where same allowed by law of State in which court held, same to be calculated from date of judgment and at rate allowed by State law.

*Rev. Stats. sec. 1010.]* Where judgment is affirmed on writ of error in Supreme Court or a circuit court, damages for delay shall be adjudged to respondent, together with single or double costs, at the court's discretion.

#### Decisions.

This rule applies to cases in equity as well as actions at law. *Perkins v. Fourniquet*, 14 How. 328.

But it does not apply to admiralty cases. *Hemmenway v. Fisher*, 20 How. 255. (See *Himley v. Rose*, 5 Cranch, 317; *The Santa Maria*, 10 Wheaton, 431.)

If the writ of error or appeal be taken for delay, damages will be awarded at the rate of ten per cent., to be computed from the date of the judgment in the court below. *Kilborn v. State Savings Institution*, 22 How. 503; *Sutton v. Bancroft*, 23 How. 320; *Jenkins v. Banning*, 23 How. 455; *Prentice v. Pickersgill*, 6 Wall. 511; *Ins. Co. v. Huchberger*, 12 Wall. 164; *Hennessey v. Sheldon*, 12 Wall. 440.

Although a case will not be dismissed on motion simply because the court may be of opinion that it was brought here for delay only, it will not hesitate to exercise its power to adjudge damages where it finds that its jurisdiction has been invoked merely to gain time. *Amory v. Amory*, 91 U. S. 356.

More than ten per cent. damages cannot be awarded under this rule, but the court may give less. *Railway Co. v. Foley*, 94 U. S. 100.

The court declares that it will, by the assessment of damages, sup-

press the evil of resorting to its jurisdiction on frivolous grounds. *Whitney v. Cook*, 99 U. S. 607.

Interest may be awarded under this rule when a judgment is affirmed against a collector of customs for moneys exacted by him as duties. *Schell v. Cochran*, 2 Wall. 827. (See *White v. Arthur*, 10 Fed. R. 80.)

#### RULE XXIV.—*Costs.*

(1.) In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for costs:—On dismissal want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

(2.) In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court. *When judgment or decree affirmed.*

(3.) In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case. *When judgment or decree reversed.*

(4.) Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States. *Rule not to apply to United States.*

(5.) In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. *Clerk to issue mandate on dismissal.*

(6.) When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. *And to insert costs.*

(7.) NOTE.—Paragraph 7 contains a schedule of the clerk's fees, which, for convenience of reference, is inserted opposite page 1.

First paragraph promulgated as original rule 45, January Term, 1838, 12 Peters, vii; revised and made part of rule 24, December Term, 1858, 21 How. xv. Second paragraph promulgated as original rule 46, December Term, 1838, 12 Peters, vii; revised and made part of this rule, December Term, 1858, 21 How. xiv. Third paragraph promulgated as original rule 22, February Term, 1810, 1 Wheaton, xviii; republished,

1 Peters, ix; amended and made rule 47, December Term, 1838, 12 Peters, vii; revised and made part of this rule, December Term, 1858, 21 How. xiv; amended April 18, 1864, 1 Wall. v. Fourth paragraph promulgated as original rule 48, December Term, 1838, 12 Peters, vii; amended and made part of this rule, December Term, 1838, 21 How. xiv. Fifth paragraph promulgated as original rule 49, December Term, 1838, 12 Peters, vii; revised and made part of this rule, December Term, 1838, 21 How. xiv. Sixth paragraph promulgated as original rule 50, December Term, 1838, 12 Peters, vii; revised and made part of this rule, December Term, 1858, 21 How. xiv.

#### Statutory Provisions.

*Act Mar. 3, 1883, chap. 143, 22 Stat. L. 631.]* The Supreme Court is empowered to prepare a table of fees to be charged by the clerk thereof, and until same is prepared the fees for recording or copying any paper or record shall not exceed fourteen cents per folio.

#### Decisions.

Costs will be allowed upon the dismissal of a writ of error for want of jurisdiction, if the original defendant be also defendant in error. *Winchester v. Jackson*, 3 *Cranch*, 514.

If judgment is reversed for want of jurisdiction, costs are not given. *Montalet v. Murray*, 4 *Cranch*, 46; *Strader v. Graham*, 18 *How.* 602; *The Mayor v. Cooper*, 6 *Wall.* 247.

In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court. *McKnight v. Craig*, 6 *Cranch*, 183.

The court does not give costs where a cause is dismissed for want of jurisdiction. *Inglee v. Coolidge*, 2 *Wheaton*, 363; *McIver v. Wattles*, 9 *Wheaton*, 650.

If a judgment or decree is reversed, except for want of jurisdiction, the plaintiff in error or appellant recovers costs in this court. *Bradstreet v. Potter*, 16 *Peters*, 317.

The United States never pay costs. *U. S. v. Barker*, 2 *Wheaton*, 395; *U. S. v. Boyd*, 5 *How.* 29.

No judgment or decree for costs can be rendered directly against the United States. *The Antelope*, 12 *Wheaton*, 546.

The mandate of the Supreme Court to the court below must be its guide in executing the judgment or decree on which it is issued. *West v. Brashear*, 13 *Peters*, 51.

On an appeal from a decree of the court below, by which a mandate of this court was construed and applied, this court will examine the mandate and the proceedings upon which it was founded, and determine whether it was correctly construed. *Mitchell v. U. S.*, 15 *Peters*, 52.

If the court below executes the mandate in accordance with its terms, no further review can be had in the Supreme Court. *U. S. v. Fremont*, 18 *How.* 30.

If the court below to which the mandate is sent does not proceed to execute it, or disobeys and mistakes its meaning, the party aggrieved

may, by motion for a mandamus, at any time, bring the errors or omissions before this court for correction. *U. S. v. Fossatt*, 21 *How.* 445.

### RULE XXV.—*Opinions of the court.*

(1.) All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

(2.) The original opinions of the court shall be filed with the clerk of this court for preservation. *Originals to be preserved.*

(3.) Opinions printed under the supervision of the justices delivering the same, need not be copied by the clerk into a book of records, but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

First paragraph adopted on revision of the rules at December Term, 1858, 21 *How.* xiv. Second paragraph promulgated March 14, 1834, 8 Peters, vii; revised and made part of this rule December Term, 1858, 21 *How.* xiv. Third paragraph added April 23, 1883 (not reported).

### Statutory Provisions.

*Rev. Stats. sec. 677.]* The Supreme Court shall have power to appoint a reporter of its decisions.

*Rev. Stats. sec. 681.]* The reporter shall cause the decisions of the Supreme Court to be printed and published within eight months after they are made, and deliver three hundred copies of the volumes to the Secretary of the Interior. In any year, when so directed by the court, he shall cause a second volume to be published.

*Rev. Stats. secs. 498, 683.]* Distribution of copies delivered to Secretary of the Interior regulated.

*Act Aug. 5, 1882, chap. 389, 22 Stat. L., 254.]* The reporter shall receive an annual salary of four thousand, five hundred dollars, when one volume is published, and an additional sum of one thousand, two hundred dollars, when a second volume is published in any year by direction of the court; and the said reporter is annually entitled to clerk hire in the sum of one thousand, two hundred dollars, and to office rent, stationery and contingent expenses in the sum of six hundred dollars. The volumes of decisions which said court shall hereafter pronounce shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and the number of volumes now required to be delivered to the Secretary of the Interior shall be furnished by the reporter without charge.

**RULE XXVI.—*Call and order of the docket.***

(1.) The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term, in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

(2.) Ten cases only shall be considered as liable to be called on each day during the term, including the one under argument.

(3.) Criminal cases may be advanced, by leave of the court, on motion of either party.

(4.) Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

(5.) Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the Attorney-General.

(6.) All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

(7.) No other case shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every case which shall have been called in its order and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

(8.) Two or more cases, involving the same question, may, by the leave of the court, be heard together; but they must be argued as one case.

(9.) If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect and the cause shall then be by him reinstated for call, ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

Cases passed and not going to foot of docket may be reinstated by consent, or, etc.

When parties do not consent, cause may be taken up on motion of one of them.

(10.) No stipulation to pass a cause without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

Stipulations passing causes not recognized.

See Supreme Court Rule 32.

First paragraph promulgated March 1830, 3 Peters, xvi; revised, corrected and made part of this rule, December Term, 1858, 21 How. xv. Second paragraph promulgated March 1830, 3 Peters, xvi; revised and made part of this rule, December Term, 1858. Third paragraph promulgated December Term, 1866, 4 Wall. vii. Fourth paragraph promulgated January 7, 1884. Fifth paragraph promulgated December Term, 1866, 4 Wall. vii. Sixth paragraph promulgated May 3, 1875, 21 Wall. v. Seventh paragraph promulgated March, 1830, 3 Peters, xvi; revised and made part of this rule, December Term, 1858, 21 How. xv. Eighth paragraph promulgated December Term, 1866, Wall. vii. Ninth and Tenth paragraphs promulgated January 18, 1875, 20 Wall. xvi.

### Statutory Provisions.

*Rev. Stats. sec. 710.]* Writs of error to State courts in criminal cases shall have precedence in the Supreme Court of all cases to which United States is not a party, excepting cases which the court may decide to be of public importance.

*Rev. Stats. sec. 949.]* When a State is a party, or the execution of the revenue laws of a State is enjoined or stayed in any suit in any court of the United States, such State or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause between private parties.

### Decisions.

After a case has been reached, and, neither party appearing, sent to the foot of the calendar, it will not, in view of the brief period of the unexpired portion of the term, and considering the presence of counsel in other cases, be taken up for argument until it is again reached in its order. *Barry v. Mercier*, 4 How. 574.

The only cases which will be taken up out of their regular order on

the docket are those where the question in dispute will embarrass the operations of Government while it remains unsettled. *U. S. v. Fossatt*, 21 *How.* 445.

The ordinances of municipal corporations laying taxes cannot be regarded as revenue laws of a State, so as to entitle causes involving questions affecting such ordinances to preference in this court. *Davenport City v. Dows*, 15 *Wall.* 390.

A cause will not be advanced for argument on the ground that it has no merits. *Amory v. Amory*, 91 *U. S.* 356.

A motion to advance a criminal cause made on behalf of the United States must state the facts in such manner that the court may judge whether the Government will be embarrassed by delay. *U. S. v. Norton*, 91 *U. S.* 558.

A case in which the execution of the revenue laws of a State has been enjoined, will not be advanced, unless it sufficiently appears that the operations of the Government of the State will be embarrassed by delay. *Hoge v. Rich. and Dan. R. R. Co.*, 93 *U. S.* 1.

A cause involving private interests only will not be advanced for hearing in preference to other suits on the docket. *Sage v. Central R. R. Co. of Iowa*, 93 *U. S.* 412.

In view of the crowded state of the docket, the court announces its determination to enforce rigidly the rule requiring causes to be ready for hearing when reached. *Hurley v. Jones*, 97 *U. S.* 318; *Alvord v. U. S.*, 99 *U. S.* 593.

An action against a tax collector for alleged wrongs done the plaintiffs while engaged in the collection of taxes due the State, and when he is not restrained from discharging any of his official duties, is not a case entitled to advancement under paragraph 4 of the above rule, or under sec. 949, Rev. Stats. *Poindexter v. Greenhow*, 3 *Sup. Ct. Rep.* 8.

Paragraph 4 of the above rule relates only to revenue cases, and cases in which the United States are concerned, which also involve or affect some matter of general public interest. Even these cannot be advanced except in the discretion of the court, and on motion of the Attorney-General. *Ib.*

#### RULE XXVII.—*Adjournment.*

The court will, at every term, announce on what day it adjourns. At least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

Promulgated January Term, 1838, 12 Peters, viii; revised and made rule 28 on revision of rules, December Term, 1858, 21 How. xv. (Note. Rule 27 of 1858 having been made part of rule 6, Dec. 14, 1874, 20 Wall. xv, this rule became No. 27.)

**Statutory Provisions.**

*Rev. Stats. secs. 684, 685, 686.] Sessions of Supreme Court.—Terms.—Adjournments for want of quorum.—Preparatory orders made by less than a quorum.*

**RULE XXVIII.—*Dismissing cases in vacation.***

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and <sup>Dismissing cases in va-</sup> appellee in an appeal, shall, in vacation, by <sup>cation by consent.</sup> their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed ; but no mandate or other process shall issue without an order of the court.

Promulgated at December Term 1857, 20 How. iv; revised and made rule 29 December Term, 1858, 21 How. xvi. (Note. Rule 27 of 1858 having been made part of rule 6, December 14, 1874, 20 Wall. xv, rule 28 became No. 27, and this rule became No. 28.

**RULE XXIX.—*Supersedeas.***

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is <sup>Extent of indemnity.</sup> for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal ; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages ; or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure ; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention

<sup>Supersedeas bonds in circuit courts must be with good and sufficient security.</sup>

of the property, and the costs of the suit, and "just damages for delay," and costs and interest on the appeal.

Promulgated December Term, 1867, 6 Wall. v.

#### Statutory Provisions.

*Rev. Stats. sec. 1000.]* Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, when the writ is a supersedeas and stays execution, or all costs only, where it is not a supersedeas.

*Rev. Stats. sec. 1001.]* No bond, obligation, or security required from the United States in such cases. Costs against United States provided for out of contingent fund of department conducting proceedings.

*Rev. Stats. sec. 1007.]* In cases where writ of error may be supersedeas, the defendant may obtain same by serving the writ of error by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after rendering judgment, and giving the security required on the issuing of citation. But if stay of proceedings is desired, he may, having served the writ of error as aforesaid, give the security required within sixty days after judgment, or afterwards by permission of a justice or judge of the appellate court. And in cases where writ of error may be a supersedeas, executions shall not issue until the expiration of ten days.

#### Decisions.

This court, in the exercise of its appellate power, cannot issue a supersedeas to stay proceedings on a judgment unless the writ of error was sued out within ten days after judgment, as prescribed by the statute. *Hogan v. Ross*, 11 *How.* 294. (*Note.* At the time of this decision the limitation was ten days instead of sixty, as now provided.)

A second writ of error, sued out more than ten days after entry of judgment, cannot operate as a supersedeas. *Ib.*; *Saltmarsh v. Tuthill*, 12 *How.* 387. (*Note.* At the time of these decisions the limitation was ten days instead of sixty, as now provided.)

An appeal does not supersede the execution of a decree, unless a bond to secure the whole amount of the debt is given within ten days, though the property is in the hands of a receiver. *Stafford v. Union Bk. of La.*, 16 *How.* 135. (*Note.* At the time of this decision the limitation was ten days instead of sixty, as now provided.)

A supersedeas of a decree in chancery can only be had by giving a bond pursuant to the statute. *Adams v. Law*, 16 *How.* 144.

If no appeal bond is taken, the appeal will be dismissed. *Boyce v. Grundy*, 6 *Peters*, 777.

The ten days given by the 23d section of the Judiciary Act (now extended to sixty days, *Rev. Stats., sec. 1007*), to take a writ of error and

obtain a supersedeas, runs from the day when judgment is entered in the court where the record remains ; and when judgment is given in the highest court of a State and the record is returned to an inferior court with an order to enter judgment there, they run from the day when judgment is so then entered. *Green v. Van Buskerk*, 3 *Wall.* 448.

A writ of error or appeal does not operate as a supersedeas unless the security is given within ten days after judgment or decree ; but the party may, nevertheless, without a supersedeas, sue out his writ of error or take his appeal at any time within the statutory period of limitation, by giving security to cover costs. *Hodgins v. Kemp*, 18 *How.* 531. (*Note.* The limitation is now extended to sixty days, Rev. Stats. sec. 1007.)

Though a decree may have been entered *nunc pro tunc*, the rights of the parties with respect to an appeal are determined by the date of the actual entry, or of the signing and filing of the final decree. *Rubber Co. v. Goodyear*, 6 *Wall.* 153.

The question of the sufficiency of an appeal bond is to be determined in the first instance by the judge who signs the citation ; but after the allowance of the appeal it becomes cognizable here. *Ib.*

It is not required that the security be in any fixed proportion to the amount of the decree, but only that it be sufficient. *Ib.*

If the writ of error be not sealed until eleven days after the judgment, it cannot operate as a supersedeas. *City of Washington v. Dennison*, 6 *Wall.* 495. (Decided before Rev. Stats. sec. 1007.)

The writ of error cannot be amended to insert a day within the time limited for a supersedeas, after that time has expired. *Hodge v. Williams*, 22 *How.* 87 ; *City of Washington v. Dennison*, 6 *Wall.* 495.

To make a writ of error a supersedeas, it is indispensable that the requirements of the act of Congress be strictly fulfilled. It is not enough that the writ be issued and served, but a copy of the writ must be lodged for the adverse party, within ten days, Sundays exclusive, after judgment or decree. *R. R. Co. v. Harris*, 7 *Wall.* 574 ; *O'Dowd v. Russell*, 14 *Wall.* 402. (Decided before Rev. Stats. sec. 1007.)

Since the passage of the act of June 1, 1872 (Rev. Stats. sec. 1007), the supersedeas bond may be executed within sixty days after the rendition of the judgment, and the writ of error may be served at any time before, or simultaneous with, the filing of the bond. *Telegraph Co. v. Eyser*, 19 *Wall.* 419 ; *Board of Commissioners v. Gorman*, 19 *Wall.* 661.

But this does not prevent an execution from being issued after the lapse of ten days. The supersedeas, by filing the bond within sixty days, stays further proceedings, but it does not interfere with what has been already done. *Board of Commissioners v. Gorman*, 19 *Wall.* 661.

In calculating the lapse of time, the date of the entry of judgment governs, and not the date when the judgment was read to and signed by the judges. *Ib.*

Unless an appeal is perfected, or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the judgment complained of, it is not within the power of a justice of this

court to allow a supersedeas. *Kitchen v. Randolph*, 93 U. S. 86. (Reviewing numerous cases.)

To make a *nunc pro tunc* order effectual for the purposes of a supersedeas, it must appear that the delay was the act of the court, and not of the parties, and that injustice will not be done. *Sage v. Central R. R. Co. of Iowa*, 93 U. S. 412.

A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress. But if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the supersedeas, we may, under sec. 719, Rev. Stat. issue an appropriate writ to restrain that action. *The Slaughter House Cases*, 10 Wall. 273; *Goddard v. Ordway*, 94 U. S. 672.

The security required upon writs of error and appeals, including the bond necessary for the supersedeas, must be taken by the judge or justice. The power cannot be delegated to the clerk. *O'Reilly v. Edrington*, 96 U. S. 724; *Haskins v. St. L. & S. E. R. R. Co.*, 3 Sup. Ct. Rep. 72.

The provision of sec. 1007, Rev. Stats., forbidding the issuance of execution until after the expiration of ten days from the rendition of judgment, in cases where a writ of error may operate as a supersedeas, has reference only to the judgments of courts of the United States. It was not the intention of Congress to interfere with the practice of the State courts as to executions until a supersedeas should be actually perfected. *Doyle v. Wisconsin*, 94 U. S. 50.

A supersedeas will be vacated when the approval of the bond therefor was obtained by fraud and perjury; and if it appears that the appellant had knowledge of such fraud and perjury, a new bond will not be accepted. *R. R. Co. v. Schutte*, 100 U. S. 644.

The power of a justice or judge below over an appeal and the security necessary for a supersedeas, is, in the absence of fraud, exhausted when he takes the security and signs the citation. From that time the control of the supersedeas, as well as the appeal, is transferred to this court. *Draper v. Davis*, 102 U. S. 370.

The amount of the supersedeas bond as well as the sufficiency of the security, are matters to be determined by the judge below. The discretion thus exercised by him will not be interfered with by this court. *Jerome v. McCarter*, 21 Wall. 17.

If, however, after the security has been accepted, the circumstances of the case, or of the parties, or of the sureties on the bond, have changed, so that security which at the time it was taken was "good and sufficient" does not continue to be so, this court, on proper application, may so adjudge and order as justice may require. *Ib.* See also *Williams v. Claflin*, 103 U. S. 753.

A bond is not sufficient for the purposes of either an appeal to this court or a supersedeas, if the obligors are not thereby bound for the payment of costs, should the appellant fail to make his plea good. *Seward v. Corneau*, 102 U. S. 161.

This, however, does not necessarily avoid the appeal, but the Supreme Court may impose such terms on the appellant as, under the circumstances, shall seem to be proper. *Ib.*

Where, after the allowance of an appeal, the required supersedeas bond was duly approved and the cause entered in the Supreme Court, the court below had no longer any control over the decree, and its subsequent order vacating that allowance is void. *Keyser v. Farr*, 105 U. S. 265.

The time within which a writ of error must be served in order to operate as a supersedeas, must be computed from the date of the judgment which is the subject of review. *Wurts v. Hoagland*, 105 U. S. 701.

If the appeal is allowed in open court the security may be taken by the court and no citation is necessary; but if the security is not given until after the term is over, a citation must be issued and served. *Sage v. R. R. Co.*, 96 U. S. 715; *Haskins v. St. L. & S. E. R'y Co.*, 3 Sup. Ct. Rep. 72.

#### RULE XXX.—*Rehearing.*

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, How rehearing applied for, and when granted. unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

Promulgated January 7, 1884.

#### RULE XXXI.—*Form of printed records and briefs.*

All records, arguments, and briefs printed for the use of the court must be in such form and size Form and size of printed records and briefs. that they can be conveniently bound together so as to make an ordinary octavo volume.

Promulgated December 19, 1879 100 U. S. ix.

#### RULE XXXII.—*Writs of error in causes removed from State courts.*

(1.) Writs of error and citations under section 5 of the act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other pur-

Writs of error and citation, under sec. 5, act March 3, 1875 (18 Stat. L. 472), to be returnable within thirty days from date, and served before return day.

poses," for the review of orders of the circuit courts dismissing suits, or remanding suits to a State court, must be made returnable within thirty days after date, and be served before the return-day.

(2.) In all cases where a writ of error or appeal is brought Plaintiff in error or to this court under the provisions of that Plaintiff in error or appeal to docket and file record within thirty-six days after date of writ, or, etc. act, it shall be the duty of the plaintiff in error or the appellant to docket the case and file the record in this court within thirty-six days after the date of the writ of error, or the taking of the appeal, if there shall be a term of the court pending at that time, and if not, then during the first six days of the next term. If If default made, motion to dismiss may be had. default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

(3.) All such cases will be advanced on motion, and heard Such cases may be advanced under the rules. under the rules prescribed by rule 6 in regard to motions to dismiss writs of error and appeals.

(4.) As soon as such a case is docketed and advanced, the Record to be printed record shall be printed, unless the parties unless parties otherwise consent. stipulate to the contrary, and file their stipulation with the clerk.

(5.) In all cases where a period of thirty days is included Double time in cases from Pacific States. in the time fixed by this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, or Nevada.

See Sop. Ct. Rules 8, 9, 10, 26.

Promulgated Jan. 16, 1882, 104 U. S. ix; amended Jan. 7, 1884. ]

#### Statutory Provisions.

Act March 3, 1875, ch. 137, sec. 5, 18 Stat. L. 472.] The order of a circuit court, dismissing or remanding a cause removed thereto from a State court, shall be reviewable by the Supreme Court on writ of error or appeal as the case may be.

**Decisions.**

This rule applies only to writs of error and appeals under the provisions of sec. 5 of the act of March 3, 1875. *Poindexter v. Greenhow*, 3 *Sup. Ct. Rep.* 8.

Before the passage of the act of March 3, 1875, sec. 5 (*supra*), a writ of error did not lie to review an order of the circuit court remanding a cause to the State court. The remedy was by mandamus to compel action. *Ins. Co. v. Comstock*, 16 *Wall.* 270; *R. R. Co. v. Wiswall*, 23 *Wall.* 507.

But since the passage of that act, the Supreme Court has jurisdiction to review by writ of error an order of the circuit court dismissing a cause, or remanding it to the State court from which it may have been removed. *Hoadley v. San Francisco*, 94 *U. S.* 4; *Ayers v. Chicago*, 101 *U. S.* 184.

A writ of error is the proper mode for reviewing in the Supreme Court the order of a circuit court remanding a cause removed thereto from a state court, and it lies without regard to the value of the matter in dispute. *Babbitt v. Clark*, 103 *U. S.* 606.

**RULE XXXIII.—*Models, diagrams and exhibits.***

All models, diagrams and exhibits of material placed in the custody of the marshal for the inspection of Models, diagrams, and exhibits must be removed within one month after cause decided. and the court on the hearing of a case, must be moved within one month after cause decided. taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Promulgated November 13, 1882, 106 U. S. vii.



# RULES

OF THE

SUPREME COURT OF THE UNITED STATES

GOVERNING

APPEALS FROM THE COURT OF CLAIMS.

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## RULE I.

In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other :

(1.) A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

(2.) A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them ; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.\*

See Ct. Cl. Rules 12, 18.

Rule promulgated December Term, 1865, 3 Wall. vii. Second paragraph amended October 27, 1873, 17 Wall. xvii. Rule extended to certain claims, May 7, 1883, 2 Sup. Ct. R. vi. (See below.)

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\* Ordered (May 7, 1883).—That Rule 1, in reference to appeals from the Court of Claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the act of June 16, 1880, c. 243, "to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes."—2 Sup. Ct. R. vi.

**Statutory Provisions.**

*Rev. Stats. sec. 707.]* An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine.\*

*Rev. Stats. sec. 708.]* All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court shall direct.

**Decisions.**

In bringing appeals from the Court of Claims to the Supreme Court, the record must be prepared strictly according to these rules. *De Groot v. U. S.*, 5 *Wall.* 419.

Only such statement of facts is to be sent up as may be necessary to enable this court to decide upon the correctness of the propositions of law raised below. This statement is to be presented in the shape of facts found by the Court of Claims to be established by the evidence in such form as to raise the question of law decided. It should not include the evidence in detail. *Ib.*

The right of a party to appeal to this court from a judgment of the Court of Claims when the amount involved exceeds \$3,000, depends upon such party's own volition, and is not dependent on the discretion of the court. *U. S. v. Adams*, 6 *Wall.* 101.

When a party signifies his intention to appeal in any appropriate mode within the ninety days allowed for taking an appeal, the limitation of time then ceases to affect the case. *Ib.*

It is not a ground for dismissing an appeal from the Court of Claims, that the statement of facts found below is not a sufficient compliance with the rules of the Supreme Court. But this court will of its own motion, while retaining jurisdiction, remand the record to the Court of Claims for a proper finding. *Ib.*

A finding which merely recites the evidence in the case is not a compliance with this rule. *Ib.*

An appellant in a cause brought up by appeal from the Court of Claims has a right to have his appeal dismissed notwithstanding the opposition of the other side. *Latham's and Deming's Appeal*, 9 *Wall.* 145.

This court will not, after hearing and deciding an appeal, stay the mandate and reform its decree, upon the allegation of error in a finding by the Court of Claims, so that the party alleging the error may cause the same to be corrected, and have the cause heard again. *U. S. v. Adams*, 9 *Wall.* 554.

Certiorari is not proper where it is desired to have the Court of Claims supply supposed defects in its conclusions deducible from the evidence before it. The proper way is to obtain an order, on motion,

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\* This is an error in the Rev. Stats. The section referred to is 1086.—EDITOR.

requiring the court below to make return as to the existence or non-existence of such facts. But this court cannot give directions as to what findings shall be made, or how the Court of Claims shall proceed to make up its findings on the points sought to have certified. *U. S. v. Adams*, 9 *Wall.* 661.

The making and pendency of a motion for a new trial in the Court of Claims, is not a sufficient ground for dismissal of an appeal previously taken. But if the motion for a new trial be granted, the appeal may be dismissed. *U. S. v. Ayres*, 9 *Wall.* 608.

If an act of Congress confers upon the Court of Claims jurisdiction of an additional class of cases, an appeal will lie to this court in such cases although the act specially conferring such jurisdiction is silent on that point. *Ex parte Zellner*, 9 *Wall.* 244.

If the finding of the Court of Claims be rather one of law when purporting to be of fact, this court will re-examine such finding. *Meade v. U. S.*, 9 *Wall.* 691.

After a case from the Court of Claims has been dismissed, a motion to reinstate it will be denied, notwithstanding the consent of the other side, if the party seeking to have it reinstated be guilty of laches. *Deming's Appeal*, 10 *Wall.* 251.

An appeal does not lie to this court from an order of the Court of Claims refusing a new trial. (The proper practice stated.) *Ex parte Russell*, 13 *Wall.* 664.

The omission of the Court of Claims to find facts as the party alleges them to be, will not justify the bringing of all the evidence on the subject before this court; but on a refusal of that court to make any finding on the subject the Supreme Court may remand the case for such finding. *Mahan v. U. S.*, 14 *Wall.* 109.

When the Court of Claims, on a claim embracing several items, rejects some but allows others, against which allowance the United States alone appeal, this court will not consider the items rejected and against whose rejection the claimant has not appealed, except so far as may be necessary for a proper understanding of the items allowed. *U. S. v. Hickey*, 17 *Wall.* 9.

A claim referred to the Court of Claims by special act of Congress to ascertain particular facts to guide the Government in the execution of a treaty, is not a case that can be reviewed by the Supreme Court on appeal. *Ex parte Atocha*, 17 *Wall.* 439.

Section 707 Rev. Stats., gives a right of appeal to this court from cases referred by special act of Congress to the Court of Claims, in the absence of a provision to the contrary. A right of appeal though not given in terms by the act may be inferred from its general character and particular indications. *Vigo's Case*, 21 *Wall.* 648.

Where this court, on an appeal from the Court of Claims, reverses the judgment and remands the cause "for further proceedings in conformity with law and justice," there is nothing to prevent the Court of Claims from setting aside its former proceedings, and trying the case *de novo*. *Ex parte Medway*, 23 *Wall.* 504.

An act of Congress extending the jurisdiction of the Court of Claims, does not dispense with the existing rules regulating appeals to this court. *U. S. v. Clark*, 94 *U. S.* 73.

The finding of facts by the Court of Claims is in the nature of a special verdict, and conclusive in this court, unless impeached for some error of law appearing in the record. *U. S. v. Smith*, 94 *U. S.* 214.

The Court of Claims, in estimating damages, must be governed by the proofs submitted ; but it is not required to set forth the elements of the calculation by which it arrives at its final result. The court may, however, be asked by either party to state whether a particular item of charge or damage is included in its finding, and if so, to what amount. *U. S. v. Smith*, 94 *U. S.* 214.

The Court of Claims, by granting a new trial after rendering judgment, and pending an appeal to this court, vacates the judgment, and resumes control over the case and the parties. *U. S. v. Young*, 94 *U. S.* 258.

In such case a writ of certiorari will not be granted to compel the court to send here the proceedings subsequent to the appeal ; but the appeal will be dismissed. *Ib.*

After judgment shall have been finally rendered by the Court of Claims, the proceedings in which the new trial was obtained may be brought here by appeal for review. *Ib.*

When the Court of Claims sends here as part of its findings all the evidence on which a fact essential to the judgment there rendered was found, from which it appears that there was no legal evidence to establish such fact, the judgment will be reversed. *U. S. v. Clark*, 96 *U. S.* 37.

The judgment of the Court of Claims as to the legal effect of the ultimate circumstantial facts of the case, is, if the question is properly presented, subject to review here ; and when the rights of the parties depend upon such circumstantial facts alone, and there is doubt as to the legal effect of them, it is the duty of that court to frame its findings so that the question as to such effect shall be presented by the record. *U. S. v. Pugh*, 99 *U. S.* 265.

## RULE II.

In all cases in which judgments or decrees have heretofore been rendered, where either party is by law <sup>Appeal, how taken, and  
upon what heard.</sup> entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged

for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1, (except the statement of facts and law therein mentioned,) shall constitute the record on which those cases shall be heard in the Supreme Court.

NOTE.—Inasmuch as this rule applies only to cases before its adoption in 1866, it is now obsolete.

Promulgated December Term, 1865, 3 Wall. vii.

### RULE III.

In all cases an order of allowance of appeal by the Court of Claims, or the chief-justice thereof in <sup>Allowance of appeal  
essential.—Limitation.</sup> va- cation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

See Ct. Cl. Rule 18.

Promulgated December Term, 1865, 3 Wall. viii.

### Statutory Provisions.

*Rev. Stats. sec. 708.]* All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered.

### Decisions.

The allowance of an appeal to this court by the Court of Claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking such allowance can be made. *Ex parte Roberts*, 15 Wall. 384.

A party may, in cases involving over \$3,000, exercise his right to appeal to this court from the Court of Claims of his own volition, and independently of any discretion of that court. *U. S. v. Adams*, 6 Wall. 101.

When the party desiring to appeal signifies his intention to do so in any appropriate mode within the ninety days allowed for taking an appeal, the limitation ceases to affect the case. *Ib.*

The Court of Claims, by granting a new trial after rendering judgment, and pending an appeal to this court, vacates the judgment and resumes control of the case and the parties. *U. S. v. Young*, 94 U. S. 258.

### RULE IV.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims <sup>Findings to be filed.</sup> shall make and file their finding of facts, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

See Ct. Cl. Rule 12.

Promulgated December Term, 1869, 9 Wall. viii.

**Decisions.**

The 4th and 5th rules regulating appeals from the Court of Claims were designed to enable a party to secure a finding of fact on any point material to a decision by that court. *Mahan v. U. S.*, 14 *Wall.* 109.

But the failure of the Court of Claims to find the fact as a party alleges it to be will not justify the bringing of all the evidence on that subject before this court, though on a refusal of that court to make any finding on the subject, the Supreme Court may remand the case for such finding. *Ib.*

**RULE V.**

In every such case, each party, at such time before trial  
Each party shall submit requests to find. and in such form as the court may prescribe,  
shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

See Ct. Cl. Rules 12, 18.

Promulgated December Term, 1869, 9 *Wall.* vii; amended January 29, 1879, 97 U. S. viii.

**Decisions.**

The 4th and 5th rules regulating appeals from the Court of Claims were designed to enable a party to secure a finding of fact on any point material to a decision by that court. *Mahan v. U. S.*, 14 *Wall.* 109.

A request for findings should embrace all the facts deemed material, and should be made at the trial. *Neal v. U. S.*, 14 *Ct. Clms. R.* 477.

Requests for additional findings should be distinct and concise, and reference should be made in the margin to the pages of the record containing the evidence. *Raines v. U. S.*, 11 *Ct. Clms. R.* 648.

A request should not be made to amend or alter a finding already made, but an additional finding should be asked. *Ib.*

**RULES OF PRACTICE  
FOR  
THE COURTS OF EQUITY  
OF  
THE UNITED STATES.\***

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**RULE I.**

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

Promulgated March 2, 1842, 1 How. xli.

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\* The Supreme Court may from time to time prescribe, in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceedings to obtain relief, of drawing up, entering and enrolling of decrees, and of proceedings before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the circuit and district courts. *Rev. Stats.* sec. 917.

The several circuit and district courts may from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. *Rev. Stats.* sec. 918.

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The rules of the Supreme Court have the force and effect of law, when not in conflict with any act of Congress. *Gaines v. Travis*, 1 Abb. Ad. 422; *The Illinois*, 1 *Brown Ad.* 13; *The Delaware*, *Olcott*, 240; *The Young America*, 1 *Newb.* 107; *Ward v. Chamberlain*, 2 *Black*, 430; *Gray v. Chicago, I. & N. R. R. Co.*, 1 *Woolw.* 63; *Pierpont v.*

## RULE II.

The clerk's office shall be open and the clerk shall be in  
 Clerk to attend first attendance therein, on the first Monday of  
 Monday of every month. every month, for the purpose of receiving,  
 entering, entertaining, and disposing of all motions, rules,  
 orders, and other proceedings, which are grantable of course  
 and applied for, or had by the parties or their solicitors, in  
 all causes pending in equity, in pursuance of the rules hereby  
 prescribed.

Promulgated March 2, 1842, 1 How. xli.

## RULE III.

Any judge of the circuit court, as well in vacation as in  
 Orders, etc., in vacation. term, may, at chambers, or on the rule-days  
 at the clerk's office, make and direct all such interlocutory  
 orders, rules, and other proceeding, preparatory to the hear-  
 ing of all causes upon their merits, in the same manner and  
 with the same effect as the circuit court could make and direct  
 the same in term, reasonable notice of the application therefor  
 being first given to the adverse party, or his solicitor, to ap-  
 pear and show cause to the contrary, at the next rule-day  
 thereafter, unless some other time is assigned by the judge for  
 the hearing.

Promulgated March 2, 1842, 1 How., xli.

Fowle, 2 *Woodb. & M.* 23; The St. Lawrence, 1 *Black*, 522; Steam Stone Cutter Co. v  
 Jones, 13 *Fed. R.* 567.

The circuit courts cannot make rules in equity which will conflict with the rules pre-  
 scribed by the Supreme Court. *Story v. Livingston*, 13 *Peters*, 359; *Bank v. White*, 8  
*Peters*, 262; *Gaines v. Relf*, 15 *Peters*, 9; *Bein v. Heath*, 12 *How.* 168.

Courts may change their practice without promulgating written rules. Uniform  
 modes of proceeding continued for a series of years as much constitute their rules as  
 those formally established by order, and when the question is whether the court has  
 changed its rules its own adjudications furnish the evidence. *Duncan v. U. S.*, 7 *Peters*,  
 435; *U. S. v. Stevenson*, 1 *Abb. U. S.* 495.

A court has power to suspend its rules and except a particular case from their opera-  
 tion. *U. S. v. Breitling*, 20 *How.* 252; *Russell v. McClellan*, 3 *Woodb. & M.* 157; *Rus-  
 sell v. McClellan*, 3 *Woodb. & M.* 359.

The equity practice of the federal courts, when not controlled by an act of Congress  
 or the rules prescribed by the Supreme Court, is, in general, regulated by the chancery  
 practice of England as it existed prior to the adoption of what are known as the  
 "new rules." *Goodyear v. Prov. Rub. Co.*, 2 *Cliff.* 351; *Gaines v. Relf*, 15 *Peters*, 9;  
*Story v. Livingston*, 13 *Peters*, 359.

Rules in equity are framed with reference to speeding a cause before hearing, and  
 do not apply afterwards. *Allen v. Mayor*, 7 *Fed. R.* 483.

## RULE IV.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office-hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

Promulgated March 2, 1842, 1 How. xlvi.

## RULE V.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees ; for filing bills, answers, pleas, demurrers, and other pleadings ; for making amendments to bills and answers ; for taking bills pro confesso ; for filing exceptions ; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

Promulgated March 2, 1842, 1 How. xlvi.

## RULE VI.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall be deemed motions, etc., not grantable of course.

shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court ex parte, and granted, as if not objected to, or refused, in his discretion.

Promulgated March 2, 1842, 1 How. xlili.

#### Decisions.

Special motions, unlike those grantable of course, require allowance by the judge, and previous notice to the adverse party. *U. S. v. Parrott*, 1 *McAllister*, 447.

A motion to appoint commissioners to take testimony abroad is not a motion grantable of course. *Ib.*

A motion to produce a paper in the possession of the plaintiff, which is necessary to enable the defendants to plead, may be granted in the discretion of the court, although no notice has been given. *Bronson v. Kensey*, 3 *McLean*, 180.

But where the possession of a paper is desired to be used in evidence a notice is necessary. *Ib.*

Previous notice of a motion for the appointment of a receiver is not necessary when counsel for the opposite party are present in court. *McLean v. The Lafayette Bank*, 3 *McLean*, 503.

There is no appeal from an interlocutory order, and as such order can be reviewed only on appeal from the final decree, circuit courts should take care not to make what should be mere intermediate orders so operate as to be final, thus compelling an immediate appeal before the actual termination of the litigation. *Forgay v. Conrad*, 6 *How.* 201.

The rule requiring notice is salutary, and will not be dispensed with. *Gray v. Chicago, I. & N. R. R. Co.*, 1 *Woolw.* 63.

Proceedings to punish for contempt in violating an injunction must be upon notice. *Ib.*

#### RULE VII.

The process of subpœna shall constitute the proper mesne Subpœna, attachment, process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper pro-

cess to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Promulgated March 2, 1842, 1 How. xliii.

#### Statutory Provisions.

*Rev. Stats. sec. 660.]* No process in any circuit court shall abate or be rendered invalid by reason of any act changing the time of holding such court; but the same shall be deemed returnable to the term next after the return day thereof.

*Rev. Stats. sec. 787.]* It shall be the duty of the marshal in each district to attend the district and circuit courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.

*Rev. Stats. sec. 790.]* The marshal and deputy shall have power after removal from office, or expiration of term, to execute all process in their hands at time of removal or expiration of term.

*Rev. Stats. sec. 911.]* All writs and processes issuing from courts of the United States shall be under the seal of the court from which issued, and shall be signed by the clerk thereof.

*Rev. Stats. sec. 912.]* All process issued from the courts of the United States shall bear teste from the day of such issue.

*Rev. Stats. sec. 922.]* When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.

*Rev. Stats. sec. 948.]* Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process, when the defect has not prejudiced, and the amendment will not injure, the party against whom issued.

*Rev. Stats. sec. 4063.]* Process against foreign ministers and their domestics void.

*Rev. Stats. sec. 4064.]* Penalty for suing out or issuing process against foreign minister or domestics.

*Rev. Stats. sec. 4065.]* In what cases process may issue against persons in service of foreign ministers.

#### Decisions.

Upon a supplemental bill in chancery, a subpoena is not required unless new parties are made. *Shaw v. Bill*, 95 U. S. 10.

The jurisdiction of the court over parties is acquired only by a service of process, or their voluntary appearance. *Herndon v. Ridgeway*, 17 How. 424.

#### RULE VIII.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a Execution. writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree

be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of non est inventus, to compel obedience to the decree.

Promulgated March 2, 1842, 1 How. xlivi.

See statutory provisions noted under Equity Rule 7.

#### RULE IX.

When any decree or order is for the delivery of possession, Writ of assistance. upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Promulgated March 2, 1842, 1 How. xliv.

See statutory provisions noted under Equity Rule 7.

#### Decisions.

The power of a court of chancery to put a purchaser of mortgaged premises into possession by a writ of assistance, extends only to the parties to the suit and those coming in as parties. *Thompson v. Smith*, 1 *Dill.* 458.

The writ of assistance is the appropriate process to issue from a court of equity to place a purchaser of mortgaged premises in possession, as against parties who are bound by the decree and who refuse to obey the same. *Terrell v. Allison*, 21 *Wall.* 289.

#### RULE X.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order Persons not parties, how affected by orders. shall have been made, shall be enabled to

enforce obedience to such order by the same process as if he were a party to the cause ; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

Promulgated March 2, 1842, 1 How. xliv.

See statutory provisions noted under Equity Rule 7.

## RULE XI.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in <sup>When subpoena to issue.</sup> the office.

Promulgated March 2, 1842, 1 How. xliv.

See statutory provisions noted under Equity Rule 7.

### Decisions.

Service of process is necessary to enable a court to exercise jurisdiction. *Walden v. Craig*, 14 Peters, 147; *Shelton v. Tiffin*, 6 How. 163; *Boswell v. Otis*, 9 How. 336.

The circuit and district courts have no authority to send process into any other district than that in which they are located. *Toland v. Sprague*, 12 Peters, 300; *Ex parte Graham*, 3 Wash. C. C. 456; *Lincoln v. Tower*, 2 *McLean*, 473. (See Rev. Stat., secs. 739, 740, 741, 742.)

## RULE XII.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

Promulgated March 2, 1842, 1 How. xliv.

See statutory provisions noted under Equity Rule 7.

**RULE XIII.**

The service of all subpoenas shall be by a delivery of a copy

Mode of service. thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Promulgated March 2, 1842, 1 How., xlv; Amended May 3, 1875, 21 Wall. v.  
See statutory provisions noted under Equity Rule 7.

**Statutory Provisions.**

*Act Mar. 3, 1875, ch. 137, sec. 8, 18 Stat. L. 472.]* In suits to enforce lien upon, or claim to, or to remove incumbrance, lien or cloud upon real or personal property, service, by order of the court, may be made on defendant wherever found, or by publication.—Time to appear prescribed.—Judgment to affect property only.—Defendant may appear within year, and reopen case. (Compare Rev. Stat. sec. 738.)

*Rev. Stats. sec. 739.]* Except as otherwise provided, no civil suit shall be brought against an inhabitant of the United States outside the district in which he resides or is found at time of service.

*Rev. Stats. sec. 740.]* If State contains more than one district, suits not of local nature against single defendant, must be brought in district where defendant resides ; but if there be two or more defendants residing in different districts of the State, suit may be brought in either district and process may run to marshal of other districts.—Endorsement by clerk.—When writ returned all to constitute one suit, etc.

*Rev. Stats. sec. 741.]* In suits of local nature process may be served on defendant in another district in same State.

*Rev. Stats. sec. 742.]* When land lies in different districts of same State, process may run into both.

**Decisions.**

The practice under the statute authorizing the court to exercise jurisdiction over the property of absent defendants should be such as to secure personal service whenever practicable ; and the order directing the absent defendants to appear and plead should be made by the court in term. *Bronson v. Keokuk*, 2 Dill. 499 ; S. C., 7 West. Jur. 320.

Shares of stock are not "personal property" within the meaning of the act authorizing service by publication. *Kilgore v. N. O. Gas Light Co.*, 2 Woods, 144.

A party temporarily in a district in which he does not reside cannot be served with process so as to give the court jurisdiction. *Smith v. Tuttle*, 5 *Biss.* 159.

Nor can a party who has been enticed or inveigled into the district by contrivances and machinations, be lawfully served. *Union Sugar Refinery v. Matthiessen*, 2 *Cliff.* 304 ; *Steiger v. Bown*, 4 *Fed. R.* 17.

Nor can service be made on a non-resident party attending a trial of a

suit in the circuit court to which he is a party. *Parke v. Hotchkiss*, 1 *Wall. Jr. C. C.* 267; *Juneau Bank v. McSpedan*, 5 *Biss.* 64.

A corporation cannot be served and made a party in any other district than a district of a State in which it was created. *Myers v. Dorr*, 13 *Blatch.* 22.

The statute (Rev. Stats. sec. 739), providing that no civil suit shall be brought against an inhabitant of the United States outside the district in which he resides or is found at the time of service of process, does not affect the general jurisdiction of the court, but only confers a personal exemption or privilege upon a defendant, which can be waived, and is waived by a general appearance in the action. *Robinson v. National Stockyard Co.*, 1 *Fed. R.* 361; *S. C.*, 20 *Blatch.* 513; *Irvine v. Lowry*, 14 *Peters*, 293; *Flanders v. Ins. Co.*, 3 *Mason*, 158; *Kitchen v. Strawbridge*, 4 *Wash. C. C.* 84; *Kelsey v. Penna. R. R.*, 14 *Blatch.* 89.

A foreign corporation doing business in another State may, as a condition to the exercise of its franchises within such State, consent to be "found" there for the purpose of being sued, within the meaning of the act of Congress. *Ex parte Schollenberger*, 96 *U. S.* 369; *R. R. Co. v. Harris*, 12 *Wall.* 65; *Robinson v. National Stockyard Co.*, 12 *Fed. R.* 361; *S. C.*, 20 *Blatch.* 513.

The objection that the defendant is a foreign corporation, and therefore cannot be served with process outside the State of its domicil, cannot be raised by demurrer. If process was irregularly served the remedy is by motion to quash. *Robinson v. National Stockyard Co.*, 12 *Fed. R.* 361; *S. C.*, 20 *Blatch.* 513.

Service of process is necessary to enable a court to exercise jurisdiction. *Walden v. Craig*, 14 *Peters*, 147; *Shelton v. Tiffin*, 6 *How.* 163; *Boswell v. Otis*, 9 *How.* 336.

The circuit and district courts have no authority to send process into any other district than that in which they are located. *Toland v. Sprague*, 12 *Peters*, 300; *Ex parte Graham*, 3 *Wash. C. C.* 456; *Lincoln v. Tower*, 2 *McLean*, 473. (But see statutes noted *supra*.)

In cases of injunction to stay proceedings at law and in cross-suits in equity, where the opposite party is a non-resident, the court will direct service to be made on the attorney for the absent party. *Eckert v. Banert*, 4 *Wash. C. C.* 370; *Ward v. Seabring*, *Id.* 472; *Ward v. Seabry*, *Id.* 426; *Seegée v. Thomas*, 3 *Blatch.* 11; *Doe v. Johnston*, 3 *McLean*, 323; *Hitner v. Luckley*, 2 *Wash. C. C.* 465; *Dunn v. Clark*, 8 *Peters*, 1; *Lowenstein v. Glidewell*, 5 *Dillon*, 325; *Crellin v. Ely*, 7 *Sawyer*, 532.

Service under the above rule does not require the copy of the subpoena to be left with a person in the dwelling house, but is satisfied by doing so at the door, outside the dwelling. *The Phoenix Ins. Co. v. Wulf*, 1 *Fed. R.* 775.

A suit to set aside a decree of foreclosure is not so far a continuation of the original foreclosure suit as to authorize service on persons outside the jurisdiction of the court. *Pacific R. R. v. Mo. Pacific Railway Co.*, 3 *Fed. R.* 772.

Parties may waive service of process and appear voluntarily. *Nelson v. Moon*, 3 *McLean*, 319.

If an attorney appears without authority such appearance does not confer jurisdiction. *Shelton v. Tiffin*, 6 *How.* 163.

After the defendant has been brought into court, the process has fulfilled its office, and its subsequent loss will not affect the judgment or the regularity of the proceedings. *York & Cumberland R. R. v. Myers*, 18 *How.* 246.

If a court exercises over the property of a non-resident, on whom no process has been served, any jurisdiction not conferred by law, its act is void and not voidable. *Boswell v. Otis*, 9 *How.* 168.

If a defendant is privileged from service of process, he should at once move to set it aside, otherwise the privilege will be held to have been waived. *Matthews v. Puffer*, 10 *Fed. R.* 606.

A non-resident person attending in another State as a witness or as a party, is privileged from service of process while in such State. *Juncau Bank v. McSpedan*, 5 *Biss.* 64; *Brooks v. Farwell*, 4 *Fed. R.* 167.

And a party attending a regular examination of witnesses before an examiner in chancery in another State is also exempt from process while there. *Plimpton v. Winslow*, 9 *Fed. R.* 365; S. C., 20 *Blatch.* 82.

After a defendant has appeared and demurred it is too late to object to the jurisdiction for want of sufficient service of process. *Hale v. Continental Life Ins. Co.*, 12 *Fed. R.* 359.

Delivery of a copy of a subpoena to the husband of a defendant, in the lower room of a building occupied as a store, and above as a dwelling, is a good service upon the wife. *Phoenix Mut. Ins. Co. v. Wulf*, 9 *Biss.* 285; S. C., 9 *Reporter*, 535.

A return of a subpoena which declared that the subpoena had been handed to a person at the domicil of the defendant, and who resided at said domicil, the defendant being absent, was held insufficient. *Von Roy v. Blackman*, 3 *Woods*, 98.

If the service is made by leaving a copy of the subpoena at the dwelling house or usual place of abode of the defendant, the return must show that the copy was handed to a member of or resident in the family of the defendant. *Ib.*

If a person declines to receive from an officer a paper presented for service, the officer may deposit it in any convenient place in the presence of the party, and the service will be good. *Norton v. Meader*, 4 *Sawyer*, 603.

When a bill is brought to obtain a new trial of a cause at law in the same court, service of process may be made on the attorney of the opposite party, even if he be a non-resident. *Minn. v. St. Paul*, 2 *Wall.* 633; *Oglesby v. Attrill*, 14 *Fed. R.* 214.

Service of process cannot be made on the attorney in fact of mortgagees, in a suit to set aside a mortgage, when new parties are sought to be introduced. *Bowen v. Christian*, 16 *Fed. R.* 729.

Parties cannot be designated by fictitious names, and a service of a

subpœna on such persons will be set aside. *Kentucky S. M. Co. v. Day*, 2 *Saw.* 468.

Under this rule, before it was amended in 1875, service could be made upon the wife by serving a copy of the subpoena upon the husband, when they were sued together; but the rule now requires personal service on each defendant, or leaving a copy for each at his or her usual place of abode, with some adult member of the family. *O'Hara v. MacConnell*, 93 *U. S.* 150.

Service of a subpoena may be made on the attorney of the opposite party in a suit in equity to restrain an action at law, when the opposite party resides out of the jurisdiction. *The Cortes Co. v. Thannhauser*, 20 *Blatch.* 59; *S. C.*, 9 *Fed. R.* 226.

#### RULE XIV.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against each defendant, if he shall require it, until due service is made.

Promulgated March 2, 1842, 1 How. xlvi.

See statutory provisions noted under Equity Rule 7.

#### RULE XV.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Promulgated March 2, 1842, 1 How. xlvi.

See statutory provisions noted under Equity Rule 7.

#### RULE XVI.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the cause to be docketed suit upon his docket as pending in the court, on return of subpoena, and shall state the time of the entry.

Promulgated March 2, 1842, 1 How. xlvi.

#### Decisions.

Courts have the power to permit an amendment of the return of both mesne and final process, and that power is freely exercised in the interest of justice, especially when the amendment will not affect the rights of third parties. *The Phenix Ins. Co. v. Wulf*, 9 *Biss.* 285; *S. C.*, 9 *Reporter*, 535; 1 *Fed. R.* 775.

The return of an officer touching any fact about which he was bound to make return, is conclusive on the parties to the suit and their privies, and it is no exception to the rule that the return necessarily involves an opinion. *Von Roy v. Blackman*, 3 *Woods*, 98.

### RULE XVII.

(1.) The appearance-day of the defendant shall be the rule-day to which the subpoena is made return- Appearance-day. able, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

(2.) The appearance of the defendant, either personally or by his solicitor, shall be entered in the order- Entry of appearance. book on the day thereof by the clerk.

Promulgated March 2, 1842, 1 *How.* xlvi.

### Statutory Provisions.

*Rev. Stats. sec. 747.]* In all courts of the United States the parties may plead and manage their causes personally, or by the assistance of such counsel and attorneys-at-law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

### Decisions.

An appearance by attorney cures all irregularities in the original process. *Gracie v. Palmer*, 8 *Wheaton*, 699; *Knox v. Summers*, 3 *Cranch*, 496; *Ferrar v. U. S.*, 3 *Peters*, 459.

A voluntary appearance to a bill of review dispenses with the necessity of service of process. *Carrington v. Brents*, 1 *McLean*, 174.

A corporation may appear by attorney in the same manner as a private person, and the authority of the attorney will in both cases be presumed. *Osborn v. Bank of United States*, 9 *Wheaton*, 738.

If there has been no service of process and an appearance has been entered by attorney without authority, the court does not acquire jurisdiction. *Shelton v. Tiffin*, 6 *How.* 163.

An objection to the service of process out of the district is waived by the entry of a general appearance. *Flanders v. Etna Ins. Co.*, 3 *Mas.* 158; *Segee v. Thomas*, 3 *Blatch.* 11; *Harrison v. Rowan*, 1 *Peters C. C.* 489.

An appearance does not preclude a party from moving to dismiss for the want of jurisdiction, or on any other ground, except irregularities in the proceedings. *U. S. v. Gates*, 6 *How.* 605.

After appearance and answer a defendant cannot at the hearing object that the bill contains no prayer for process, or that he was not served. *Segee v. Thomas*, 3 *Blatch.* 11.

A defendant who appears and puts in an answer waives all irregularities in the form and service of the subpoena. *Goodyear v. Chaffee*, 3 *Batch.* 268.

One of several defendants may move the dismissal of a bill for non-prosecution against an absent defendant who does not, and is not compellable to, appear. But the court may grant further time. *Piquet v. Swan*, 5 *Mason*, 561.

A corporation does not waive an objection to the jurisdiction of the court by appearing and pleading to the jurisdiction. *Deeper v. N. Y. Belting, &c. Co.*, 11 *Batch.* 76.

A permission to a defendant to withdraw a general appearance without prejudice to the plaintiff does not deprive him of the benefit of such general appearance in curing irregularities. *Creighton v. Kerr*, 20 *Wall.* 8.

Appearing by counsel and moving to dismiss for want of jurisdiction on other grounds, is a waiver of a non-resident's privilege to be sued in his own district. *Jones v. Andrews*, 10 *Wall.* 327.

An appearance after decree, and moving to strike off the cause on the ground that no process was served, does not waive previous defects of service. *Dorr v. Gibboney*, 3 *Hughes*, 382.

### RULE XVIII.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a <sup>When answer, plea, or</sup> judge of the court, upon motion for that <sup>demurrer due.</sup> purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office on the rule-day next succeeding that of entering his appearance. In default thereof the plaintiff may, at his election, enter an order (as of course) <sup>Default.</sup> in the order book, that the bill be taken pro confesso ; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order if the same can be done without an answer, and is proper to be decreed ; or the plaintiff, if he requires any discovery or answer to enable him to obtain a <sup>Attachment at election</sup> proper decree, shall be entitled to process <sup>of plaintiff.</sup> of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill,

within a period to be fixed by the court or judge, and undertaking to speed the cause.

See Equity Rules 46, 55.

Promulgated March 2, 1842, 1 How. xli; amended October 28, 1878, 97 U. S. viii.

### Decisions.

If, after a demurrer has been overruled, any of the defendants fail to answer within the time limited by the court, the bill may be taken pro confesso as to them. *Suydam v. Beals*, 4 *McLean*, 12.

A decree taken pro confesso before the expiration of the time given to the defendant to answer, is irregular and will be set aside. *Fellows v. Hall*, 3 *McLean*, 487. See also *Fellows v. Hall*, 3 *McLean*, 281.

A rule for an answer when process has not been regularly served, and a decree pro confesso for want of an answer, are irregular. *Treadwell v. Cleaveland*, 3 *McLean*, 283.

The omission to enter a formal order that the bill be taken pro confesso, will not affect the validity or regularity of the final decree. *Linder v. Lewis*, 1 *Fed. R.* 378.

If one of several defendants make default, his default and a formal decree pro confesso may be entered: but no final decree on the merits can be made until the case is disposed of as to the other defendants. The defaulting defendant is simply out of court and can take no further part in the case. And if the bill is dismissed on the merits, it must be dismissed as to the defendant in default as well as the others. *Frow v. De La Vega*, 15 *Wall.* 552.

Where a decree pro confesso is entered, the only question for the consideration of the court on appeal is whether the allegations of the bill are sufficient to support the decree. *Masterson v. Howard*, 18 *Wall.* 99.

It is error to render a final decree for want of appearance at the first rule-day after service of a subpoena. *O'Hara v. McConnell*, 93 U. S. 150.

If a defendant obtains time to answer he may still file a demurrer within the time allowed to answer. *N. J. v. N. Y.*, 6 *Peters*, 323.

The only effect of a decree pro confesso is to enable the case to be proceeded with ex parte. Unless followed by a final decree, it settles no rights. *Lockhart v. Horn*, 3 *Woods*, 542.

### RULE XIX.

When the bill is taken pro confesso the court may proceed Decree on default; to a decree at any time after the expiration reopening. of thirty days from and after the entry of the order to take the bill pro confesso, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of

the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

*Costs on reopening and other conditions.*

See Equity Rules 48, 55.

Promulgated March 2, 1842, 1 How. xlvi; amended Oct. 28, 1878, U. S. viii.

#### Decisions.

A judgment by default irregularly entered may be set aside without an affidavit of merits, but if regular, an affidavit is required. *Sheepshanks v. Boyer*, 1 *Baldwin*, 462; *Kemball v. Stewart*, 1 *McLean*, 382; *Jenks v. Garretson*, 4 *McLean*, 258.

It is error to render a final decree for want of appearance at the first rule-day after service of a subpoena. *O'Hara v. McConnell*, 92 U. S. 150.

When the defendant has appeared by solicitor, notice of an application for a decree, after an order pro confesso, must be given to such solicitor. *Bennett v. Hœfner*, 17 *Wall*. 341.

The court has no power to set aside a decree pro confesso, and reopen the case, after the term at which such decree was rendered. *Linder v. Lewis*, 1 *Fed. R.* 378.

### RULE XX.

Every bill, in the introductory part thereof, shall contain introductory part of bills; the names, places of abode, and citizenship form. of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of — : A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the state of —. And thereupon your orator complains and says that, &c."

Promulgated March 2, 1842, 1 How. xlvii.

#### Decisions.

Persons cannot be made parties to a bill by designating them by fictitious names in the introductory part of the bill, or in the prayer for process. *Kentucky S. M. Co. v. Day*, 2 *Saw.* 468.

Legal and equitable causes of action cannot be joined at law or in equity in the United States courts. *Stafford Nat. Bank v. Sprague*, 8 *Fed. R.* 377; *Montejo v. Owen*, 14 *Blatch.* 324,

**RULE XXI.**

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff ; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill ; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law ; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief ; and if an injunction, or a writ of ne exeat regno, or any other special order, pending the suit, is required, it shall also be specially asked for.

Plaintiff may state matter of avoidance.  
Prayer of bill.

See Equity Rule 5, and statutory provisions and decisions noted thereunder.  
Promulgated March 2, 1842, 1 How. xlviij.

**Statutory Provisions.**

*Rev. Stats. sec. 717.]* Writs of ne exeat may be granted by Supreme and circuit courts, and the judges thereof respectively; but suit in equity must be first commenced, and proof furnished that defendant intends quickly to depart from the United States.

**Decisions.**

The bill must contain a sufficient matter of fact to maintain the plaintiff's case. *Harrison v. Nixon*, 9 Peters, 483.

The complainant is not required to set forth the minute facts of his case, general averments of precise facts being usually sufficient. *Dunham v. Railway Co.*, 1 Bond, 442.

Sufficient equity must appear on the face of the bill to warrant the court in granting the relief prayed. *Harding v. Handy*, 11 Wheaton, 103.

It is not necessary that the bill should allege or specifically describe all the evidence ; but it must contain allegations broad enough to cover the evidence relied on. *Nesmith v. Calvert*, 1 Woodb. & M. 84.

A bill may be framed with a double aspect, so that if the court decides against the plaintiff in one view of the case, it may afford him relief in another. *Hobson v. McArthur*, 16 *Peters*, 182.

But the alternative case must be the foundation for the same relief. *Shields v. Barrow*, 17 *How.* 130.

Under a prayer for general relief other relief may be afforded than that specifically prayed, but the same must accord with the case made by the bill. *English v. Foxall*, 2 *Peters*, 595; *Walden v. Bodly*, 14 *Peters*, 156.

Under a prayer for general relief, such relief only will be granted as the case made by the bill and proofs, will warrant. *Hobson v. McArthur*, 16 *Peters*, 182.

If specific relief be prayed, the court cannot grant other relief which is inconsistent with or different from that specially asked, although there be a prayer for general relief. *Wilson v. Graham*, 4 *Wash. C. C.* 53.

A prayer for general relief is a prayer for any relief the court can give (except by injunction,) upon the facts alleged in the bill. *Chicago, St. L. & N. O. R. R. Co. v. McComb*, 2 *Fed. R.* 18.

In a final decree, when the facts stated in the bill are established or admitted at the hearing justify it, a writ of ne exeat respublica may be provided for, even though there be no prayer in the bill for the writ. The authorities indicate that the writ may also be issued, upon a proper application, after final judgment or decree. The limitation of the above rule only applies when the application for the writ is made "pending the suit." *Lewis v. Shainwald*, 7 *Sawyer*, 403.

## RULE XXII.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

See Equity Rules 47, 48, 49, 50, 51, 54.

Promulgated March 2, 1842, 1 *How.* xlvi.

## RULE XXIII.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall:

state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an <sup>Prayer for provisional</sup> junction, or a writ of ne exeat regno, or any <sup>remedy need not be re-</sup> other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

Promulgated March 2, 1842, 1 How. xlvi.

#### **Decisions.**

When a defendant appears generally in a suit, he waives his right to object that he was not named as a defendant in the prayer for subpoena. *Buerk v. Imhaeuser*, 8 Fed. R. 459.

One defendant cannot object that others are improperly named or omitted in the prayer for process. *Ib.*

#### **RULE XXIV.**

Every bill shall contain the signature of counsel annexed <sup>Signature of counsel;</sup> to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

See Equity Rule 31.

Promulgated March 2, 1842, 1 How. xlvi.

#### **Decisions.**

A bill must be signed by counsel or it is demurrable. But a signing on the back is sufficient. *Dwight v. Humphreys*, 3 *McLean*, 104.

A bill filed without the signature of the plaintiff or counsel, will be ordered to be taken off the files. But having been taken off and signed it may be restored. *Roach v. Hulings*, 5 *Cranch C. C.* 637.

The answer must also be signed by counsel. *Davis v. Davidson*, 4 *McLean*, 136.

A printed name of counsel is not his signature. *Nightingale v. Oregon Central R. R. Co.*, 2 *Saw.* 338.

When an attorney, who is also a counselor of the court, signs the bill as "solicitor for complainant," it is a sufficient compliance with this rule. *Stinson v. Hildrop*, 8 *Bissell*, 376.

#### **RULE XXV.**

In order to prevent unnecessary costs and expenses, and <sup>Taxable costs for bill</sup> to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no

case exceed the sum which is allowed in the State court of chancery in the district, if any there be ; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

Promulgated March 2, 1842, 1 How. xl ix.

### RULE XXVI.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no Bills not to contain unnecessary, impertinent or scandalous matter. recitals of deeds, documents, contracts, or other instruments, in *haec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal ; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Exception for ; reference; costs.  
Costs on report favorable to plaintiff.

Promulgated March 2, 1842, 1 How. xl ix.

### Decisions.

It is not necessary to specify particulars of infringement of letters-patent. A general averment that the defendant has infringed is sufficient to put him upon his answer. *Turrell v. Cammerrer*, 3 *Fish. Pat. Cas.* 462.

Exceptions for impertinence will not be allowed, unless it is clear that the matter excepted to cannot be material to the plaintiff's case. *Wells v. Oregon Ry. & N. Co.*, 15 *Fed. R.* 561.

Matters are not necessarily impertinent because they are such as the court will judicially take notice of. *Ib.*

It is not necessarily impertinent to a bill for an injunction to refer to recent adjudications of the question involved in similar cases by other courts. *Ib.*

Exceptions for impertinence are only allowed where it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it may be material, the exception will not be allowed, as that would leave the defendant without remedy, but the allegation will be allowed to remain in the answer and the effect therof, if found to be true, determined on the final hearing. *Chapman v. School District*, 1 *Deady*, 108.

## RULE XXVII.

No order shall be made by any judge for referring any bill, <sup>Exception to be in writing, signed by counsel, and designating parts objected to.</sup> answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, <sup>Abandonment of order.</sup> when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

Promulgated March 2, 1842, 1 How. xlix.

## RULE XXVIII.

The plaintiff shall be at liberty, as a matter of course, and <sup>When bills amended or</sup> without payment of costs, to amend his bill, <sup>course.</sup> in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has <sup>When costs to be paid</sup> been so taken, before any answer or plea or <sup>defendant, and copy furnished.</sup> demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

*See Equity Rules 29, 42, 45, 46.*

Promulgated March 2, 1842, 1 How. l.

## RULE XXIX.

After an answer, or plea, or demurrer is put in, and before <sup>Amendment by leave of Court; costs; terms.</sup> replication, the plaintiff may, upon motion or petition, without notice, obtain an order

from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

See Equity Rules 28, 42, 45, 46.

Promulgated March 2, 1842, 1 How. l.

#### Statutory Provisions.

*Rev. Stats. sec. 954.]* No summons, writ, declaration return, process or other proceedings in civil causes in United States courts, shall be abated, etc., for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter of law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

#### Decisions.

The court should not allow a new and wholly different cause of action to be made by amendment. *Shields v. Barrow*, 17 *Hans.* 130.

Amendments can only be allowed when the bill is found defective (*a*) in proper parties; (*b*) in its prayer for relief; (*c*) in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself; or (*d*) for putting in issue new matters to meet allegations in the answer. *Ib.*

In a suit for infringement of a patent, if the defendant sets up a license, and the complainant would give evidence of its abandonment, the bill must be amended, as under rule 45, a special replication is not permitted. *Wilson v. Stotley*, 4 *McLean*, 275.

An amendment cannot be allowed which would in effect amount to the institution of a new and materially different suit either as to parties or right of action. *Goodyear v. Boon*, 3 *Blatch.* 266.

An amendment of the bill cannot be allowed after a bill has been long

pending and the answer and replication have been filed and depositions taken, unless the complainant at least shows that he could not have made it at an earlier stage of the cause. *Ross v. Carpenter*, 6 *McLean*, 382.

Leave to amend after hearing is properly refused, if the proposed amendment would present a new case. *Snead v. McCoul*, 12 *How.* 407.

An amendment may be allowed after deciding against the bill on demurrer. The power is unquestionable upon general principles and is supported by the act of 1789 (Rev. Stats. sec. 954, *supra*). *Hunt v. Rousmanier*, 2 *Mas.* 342.

The court may, for the purpose of avoiding unnecessary delay, entertain a motion to amend at the same time that exceptions to the bill are filed. *Kettredge v. Clairmont Bank*, 3 *Story C. C.* 590.

On the reversal of a decree because the bill by itself, or in connection with the answer, did not make out a full case, directions are given as to the requisite amendments, and leave given to introduce new parties. *Harrison v. Nixon*, 9 *Peters*, 483. (See also *Esthe v. Lear*, 7 *Peters*, 130.)

If the amendment does not introduce other defendants, no new subpoena need issue; and if no new fact is introduced and the merits are not affected, the plaintiff may proceed without answer to the amendment. *Longworth v. Taylor*, 1 *McLean*, 514.

Amendment of the bill will not have the effect of dissolving an injunction previously granted. *Read v. Consequa*, 4 *Wash. C. C.* 174.

Amendment of the bill by leave of the court, instead of special replication, is the proper mode of pleading new matter. *Dupont v. Mussy*, 4 *Wash. C. C.* 128.

In a bill for specific performance, if the contract be not set out with exactness, amendment may be allowed on easy terms, if the substance of it appears; and so of mistakes of form in pleading the statute of frauds. *Tufts v. Tufts*, 3 *Woodb. & M.* 456.

The objection that a person made defendant in foreclosure is not a necessary party may be obviated by amendment. *Dwight v. Humphries*, 3 *McLean*, 104.

An objection that a party is joined as complainant over whom the court has not jurisdiction may be met by an amendment, if he be not a necessary party. *Conolly v. Taylor*, 2 *Peters*, 556.

In the absence of binding rules to the contrary, a court of equity has power, after a cause has been heard and a case for relief made out, (but not the case disclosed by the bill,) to allow an amendment of the pleadings on terms that the party not in fault has no reasonable cause to object to. *Neale v. Neales*, 9 *Wall.* 1.

It is gross irregularity to hear a case, without imposing terms, on an amended bill filed after replication, without leave of the court. *Wash. R. R. v. Bradleys*, 10 *Wall.* 299.

A complainant is bound by an admission of fact contained in his bill, unless he obtain leave to amend before the hearing. *Provost v. Gratz*, 3 *Wash. C. C.* 454.

Amendments should rarely, if ever, be permitted so changing the char-

acter of the pleadings as to make substantially a new case, after the cause has been heard. *Waldon v. Bodly*, 14 *Peters*, 156.

Staleness of the demand in suit affords no ground for refusal of an amendment of a bill. *Fisher v. Rutherford*, 1 *Baldw.* 88.

An amendment was allowed on final hearing, making a different case, when, on the pleadings and proofs as they stood, the relief prayed could not be granted, it appearing that the proposed amendment harmonized with the whole case in its essential features and did not change the subject matter. *Battle v. Mut. Life Ins. Co.*, 10 *Blatch.* 417.

An amendment seeking to add new parties will be refused after replication and proofs, if it appear that the plaintiff might have amended before. *Clifford v. Coleman*, 13 *Blatch.* 210.

An amendment will be allowed after final hearing, although it may change the character of the bill, if the cause was tried as it must have been had the bill been originally as amended. *Tremaine v. Hitchcock*, 23 *Wall.* 518.

After a decree and accounting an amendment will be denied which seeks to recall an admission in the answer. *Ruggles v. Eddy*, 11 *Blatch.* 524.

Amendments denied under the peculiar circumstances of the cases. *Webster Loom Co. v. Higgins*, 13 *Blatch.* 249; *Roberts v. Buck*, 6 *Fish. Pat. Cas.* 325.

Amendments regularly made under this rule cannot be avoided by a motion to strike from the record, or to set aside the order granting them. *Lichtenauer v. Cheney*, 8 *Fed. R.* 876.

New matter arising since the bill was filed cannot be inserted by amendment. *Mason v. Hartford, P. & F. R. R. Co.*, 10 *Fed. R.* 334.

If an amendment, in effect, makes a new case, the court will grant a motion to take it from the files. *Oglesby v. Attrill*, 14 *Fed. R.* 214.

### RULE XXX.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after Abandonment of order, replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

See Equity Rules 42, 45, 46.

Promulgated March 2, 1842, 1 How. H.

### RULE XXXI.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in Demurrer or plea not to be filed, except upon his opinion it is well founded in point of certificate of counsel. law, and supported by the affidavit of the defendant ; that it

is not interposed for delay ; and, if a plea, that it is true in point of fact.

See Equity Rule 24.

Promulgated March 2, 1842, 1 How. li.

#### Decisions.

If a plea is filed without the certificate of counsel, and the plaintiff files a demurrer to it, and the cause is brought on for argument on the insufficiency of the plea, the want of a certificate is waived. A motion should have been made to take the plea from the files, or it might be disregarded entirely. *Goodyear v. Toby*, 6 *Blatch.* 130.

When this rule is not complied with, the demurrer will be disregarded although it may otherwise be good. *Secor v. Singleton*, 9 *Fed. R.* 809.

A decree pro confesso may be entered after the filing of a demurrer which does not comply with this rule. *Ib.*

A plea may be disregarded, if it contain mere conclusions of law, or lacks the affidavit and certificate required by this rule. *Nat. Bank v. Insurance Co.*, 104 *U. S.* 54.

### RULE XXXII.

The defendant may at any time before the bill is taken for <sup>Defendant may plead, confessed, or afterward with the leave of</sup> demur or answer whole <sup>or part of bill.</sup> the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer to the residue ; but in every case in which the bill

<sup>Plea when bill charges</sup> specially charges fraud or combination, a fraud. <sup>plea to such part must be accompanied with</sup> an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

See Equity Rules 36, 37, 39, 44.

Promulgated March 2, 1842, 1 How. li.

#### Decisions.

The office of a demurrer is to raise the question of the right to maintain the suit, admitting all the allegations to be true ; and the court will not, therefore, examine *aliunde* what facts might or might not defeat the suit, for this is the office of a plea or an answer. *Ocean Ins. Co. v. Fields*, 2 *Story C. C.* 59.

A demurrer operates as an admission, for the purposes of the demurrer, that all the allegations of the bill, well pleaded, are true. *Foote v. Linck*, 5 *McLean*, 616 ; *Griffing v. Gibb*, 2 *Black*, 519 ; *Woodworth v. Edwards*, 3 *Woodb. & M.* 120 ; *Bayorque v. Cohen*, 1 *McAll.* 113.

A defendant may, in his answer, insist upon the same cause of demurrer after his demurrer has been overruled. *The William Penn*, 3 *Wash. C. C.* 484.

A demurrer to the whole bill cannot be sustained if any independent part of the bill be good so as to entitle the plaintiff to relief. *Livingston v. Story*, 9 *Peters*, 632; *Atwill v. Ferrett*, 2 *Blatch*. 39.

Nor will a formal protestation accompanying the demurrer prevent the overruling of a general demurrer, if any separable part of the bill be good. *Atwell v. Ferritt*, 2 *Blatch*. 39.

Laches may be taken advantage of by demurrer. *Maxwell v. Kennedy*, 8 *How.* 210.

A defendant who relies upon a statute for his defense should not demur, but plead the statute, and the court will take judicial notice of it. *Griffing v. Gibb*, 2 *Black*, 519.

If the bill shows that the plaintiff's case is within the statute of limitations, and does not show facts bringing it within any exception of the statute, a demurrer will lie. *Wisner v. Barnet*, 4 *Wash. C. C.* 631.

If an agreement concerning lands is not alleged to have been in writing, the advantage of the statute of frauds may be taken by demurrer. *Randall v. Howard*, 2 *Black*, 585.

If the demurrer is overruled, the defendant may still have leave to answer on payment of costs. *Woodworth v. Edwards*, 3 *Woodb. & M.* 120. (See Equity Rule 34.)

A defendant is not bound to put his defense by way of answer, but he may, if it be a subject for a plea, avail himself of that form, thereby saving the expense of examining witnesses and also the delay. *Wilson v. Graham*, 4 *Wash. C. C.* 53.

All defenses by way of abatement, or going to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea, and not by answer, which necessarily admits the right and capacity of the party to sue. *Livingston v. Story*, 11 *Peters*, 351.

An objection for want of parties is not matter of abatement, but goes in bar of the whole bill. If the defect be fatal it may either be pleaded or relied on in the answer. *Tobin v. Walkinshaw*, 1 *McAll*. 26.

A plea in bar must extend to every part of the bill. *Piatt v. Oliver*, 1 *McLean*, 295; *Lewis v. Baird*, 3 *Id.* 56.

A plea in bar denying only part of the material facts averred in the bill is defective, because a mere denial of facts is proper for an answer, but not for a plea. *Milligan v. Milledge*, 3 *Cranch*, 220.

A plea may be good in part and bad as a whole. *Kirkpatrick v. White*, 4 *Wash. C. C.* 595.

If want of jurisdiction is not apparent on the record, an alleged defect can only be taken advantage of by plea. *Fremont v. Merced Mining Co.*, 1 *McAll*. 267.

Objections to jurisdiction, for the want of parties, of equity in the bill, or that there is a remedy at law, may be made at the hearing, or on appeal. Such objections need not be made by demurrer or plea, or taken in the answer. *Baker v. Biddle*, 1 *Baldw.* 394. *Contra*, *Nesmith v. Calvert*, 1 *Woodb. & M.* 34.

If leave is given to appear and answer the bill, a demurrer will be a compliance. *N. J. v. N. Y.*, 6 *Peters*, 323.

Upon a hearing of an issue upon a plea, no question arises as to the sufficiency of the plea in point of law. It is only necessary to be proved in point of fact. *Hughes v. Blake*, 1 *Mas.* 515.

A defendant may meet the complainant's bill by several modes of defense. He may demur, answer and plead to different parts of the bill. But the defendant must answer the proper matter, and demur to the improper matter specifically; and if he demur to the whole, the demurrer is bad if part of the bill be good. *Livingston v. Story*, 9 *Peters*, 632.

If the defendant answer to the same matter covered by his plea, the latter overrules the former. *Ferguson v. O'Hara*, 1 *Peters C. C.* 493; *Stearns v. Page*, 1 *Story C. C.* 304. (See Equity Rule 37.)

When one defense is made by answer and another by plea, such plea will be ordered to stand as an answer, the plea, in such case, being considered as part of the answer, and with the permission of the court, may be excepted to. *Lewis v. Baird*, 3 *McLean*, 56.

If a plea is only to some part of the bill, the defendant must either answer or demur to the residue. *Ferguson v. O'Hara*, 1 *Peters C. C.* 493.

A demurrer to a part of the bill followed by an answer as to the rest is not deemed overruled or withdrawn. *Pierpont v. Fowle*, 2 *Woodb. & M.* 23.

The objection that a court of equity has not jurisdiction because the complainant has an adequate remedy at law, should be taken by plea or answer. It is too late to raise it for the first time on appeal, unless the matter objected to is apparent on the face of the bill. *Wylie v. Coxe*, 15 *How.* 415.

Matters of abatement should be pleaded and not set up in the answer; but an objection of the want of proper parties should be suggested by the answer. (See Equity Rule 52.) *U. S. v. Gillespie*, 6 *Fed. R.* 803.

If a foundation is laid in the bill for some of the discovery and relief prayed, a demurrer to the whole bill will be overruled. *Buerk v. Imhaeuser*, 8 *Fed. R.* 457.

A demurrer for want of parties must name the proper parties. *Dwight v. Cent. Vt. R. R. Co.*, 9 *Fed. R.* 785.

When a defendant both answers and demurs, but takes no testimony in support of his answer, leave will not be granted to take proofs upon overruling the demurrer, if the time for taking testimony as prescribed by Equity Rule 69 has expired. *Orendorf v. Budlong*, 12 *Fed. R.* 24.

A demurrer only admits matters of fact positively alleged, and not conclusions of law or mere pretences and suggestions, nor the correctness of the ascription of a purpose to parties when not justified by the language used and facts positively alleged. *Dillon v. Bernard*, 21 *Wall.* 430; *Taylor v. Holmes*, 14 *Fed. R.* 498,

A demurrer to the whole bill, and, at the same time, an answer to the whole bill, is a waiver of the demurrer. *Adams v. Howard*. 9 *Fed. R.* 347.

A special demurrer to a part of the bill must point out with certainty the part demurred to. This is not only necessary for reasons of conven-

ience, but, unless the demurrer had this precision, there must be great uncertainty in the judgment, if the demurrer is sustained. *Atwell v. Terrett*, 2 *Blatch.* 39; *The Chicago, St. L. & N. O. R. R. Co. v. McComb*, 2 *Fed. R.* 18.

A demurrer lies merely to matter apparent on the face of the bill. *The Chicago, St. L. & N. O. R. R. Co. v. McComb*, 1 *Fed. R.* 18.

A defendant cannot demur to the whole bill, plead to the whole bill, and answer the whole bill at the same time. *Crescent City Live Stock, L. & S. H. Co. v. Butchers Union Live Stock, L. & S. H. Co.*, 12 *Fed. R.* 225.

Where jurisdiction properly appears on the face of the bill, it can only be questioned by plea setting forth facts to overcome the allegations in that respect contained in the bill. *Wickliffe v. Owings*, 17 *How.* 47; *Pond v. Vermont Valley R. R. Co.*, 12 *Blatch.* 282.

If a demurrer covers the whole bill and is good as to part only, it will be overruled. *Heath v. Erie R. R. Co.*, 8 *Blatch.* 347.

A demurrer to the whole bill setting up, that some of the relief prayed is not cognizable in equity, will be overruled if some of the relief prayed is proper. *Brandon Mfg. Co. v. Prime*, 14 *Blatch.* 371.

A demurrer being proper only for defects apparent on the face of the bill and exhibits, the complainant will not be allowed to fortify the case by invoking facts that do not appear from the bill itself. *Phelps v. McDonald*, 2 *McArthur*, 375.

Demurrer for the want of equity is improper in case the bill is good in substance, and the objection is that for some technical reason the relief sought cannot be obtained in that suit. *Nicholas v. Murray, 5 Sawyer*, 320.

When there is a demurrer to the whole bill, and also to a part, and the latter only is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged to be bad, overrule the demurrer as to the residue, and direct the defendant to answer thereto. *Powder Co. v. Powder Works*, 98 *U. S.* 126.

Where it appears by the complainants bill that the remedy is barred by lapse of time, or that by reason of his laches he is not entitled to relief, the defendant may demur. *Nat. Bank v. Carpenter*, 101 *U. S.* 567.

The above rule permits a demurrer to a part of the bill, a plea to a part, and an answer as to the residue. If impliedly, this forbids a demurrer to the whole bill, and, at the same time, an answer to the whole bill, the plaintiff's remedy is by moving to strike out either the answer or the demurrer, or to compel the defendant to elect which he will abide by. By going to argument on the demurrer the plaintiff waives the benefit of the objection, and Equity Rule 37 applies. *Hayes v. Dayton*, 8 *Fed. R.* 702.

The demurrer of one defendant cannot be held to overrule the plea of another defendant. *Dakin v. Union Pacific Railway Co.*, 5 *Fed. R.* 665.

A plea to a bill in equity, that there are divers and sundry persons whose names are known to and ascertainable by the plaintiffs and not by the defendants, not setting forth any names, and not accompanied by an

answer, but accompanied by a demurrer for want of parties, is not a good plea. *Dwight v. Central Vermont R. R. Co.* 20 *Blatch.* 200.

A defendant cannot demur to the whole bill and also answer the whole bill, especially where the answer sets up everything that is in the demurrer; and he will, on motion, be compelled to elect between his demurrer and his answer. *Adams v. Howard,* 20 *Blatch.* 38.

### RULE XXXIII.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

See Equity Rule 38.

Promulgated March 2, 1842 1 *How.* li.

### Decisions.

If the plea is unexceptionable in form and nature, the complainant must either set it down for argument, or he must reply to it and put in issue the facts relied on in the plea. By setting down the plea for argument, he admits the truth of all facts alleged in the plea, and merely denies their sufficiency. If, on the other hand, he replies to the plea denying the facts therein stated, he admits that, if they are true, they are sufficient; and if they are proved to be true the bill must be dismissed. *R. I. v. Mass.,* 14 *Peters,* 210; *Myers v. Dorr,* 13 *Blatch.* 22.

Where issue is taken on the plea, no question arises as to its sufficiency in point of law. *Hughes v. Blake,* 1 *Mas.* 515; S. C., 6 *Wheaton,* 453.

A replication to a plea is an admission of its sufficiency. *Hughes v. Blake,* 6 *heaton,* 453.

If a replication is interposed to a plea, the parties proceed to an examination of witnesses in the same way as in case of a replication to an answer. (See Equity Rules 66, 67, 68, 69.) *Reissner v. Anness,* 13 *Off. Gaz. Pat.* 7.

Where the plea sets up facts which may be a defense, a motion to strike it off will be saved for the hearing to be then treated as the testimony may warrant. *Williams v. Empire Transportation Co.,* 6 *Reporter,* 673.

In a case where judgments are pleaded in bar, the court may, on motion, refer the pleas to a master to ascertain the truth of the same. *The Emma Silver Mining Co. (Limited) v. The Emma Silver Mining Co. of N. Y.,* 1 *Fed. R.* 39.

A demurrer to a plea involves the sufficiency of the bill, as well as of the plea; and if the bill cannot be maintained as to a material fact, the defect must be remedied by amendment. *Beard v. Fowler,* 2 *Bond,* 13.

A special replication, in reply to a plea or demurrer, setting up new matter and matter arising since the bill was filed, cannot be allowed, and may be struck off on motion. *Mason v. Hartford, P. & F. R. R. Co.,* 10 *Fed. R.* 334.

## RULE XXXIV.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him pro confesso, and the matter thereof proceeded in and decreed accordingly.

Promulgated March 2, 1842, 1 How. lii.

## Decisions.

If the defendant do not answer within the time assigned for that purpose by the court on overruling a demurrer, a decree pro confesso may be taken. *Suydam v. Beals*, 4 *McLean*, 12.

Notwithstanding the defendant demur and his demurrer is overruled, he may insist upon the same matter in his answer. *Crawford v. The William Penn*, 3 *Wash. C. C.* 484.

If the demurrer is overruled, the defendant may still have leave to answer on payment of costs. *Woodworth v. Edwards*, 3 *Woodb. & M.* 120.

When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matter adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto. *Powder Co. v. Powder Works*, 98 *U. S.* 126.

On overruling a demurrer, leave must be given to answer. *Wooster v. Blake*, 7 *Fed. R.* 816.

## RULE XXXV.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

Promulgated March 2, 1842, 1 How. lii.

### Statutory Provisions.

*Rev. Stats. sec. 954.]* Any court of the United States may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

### Decisions.

The court may permit an amendment of the bill after sustaining a demurrer. The power is unquestionable upon general principles and comes within the act of 1789 (*Rev. Stats. sec. 954, supra*). *Hunt v. Rousmanier*, 2 *Mas.* 342.

The complainant is not entitled, as a matter of right, to amend his bill after a demurrer thereto has been sustained; but the court may, in its discretion, grant him leave to do so upon such terms as it shall deem reasonable. *National Bank v. Carpenter*, 101 *U. S.* 567.

An order refusing a complainant the privilege of amending, after a demurrer to the bill has been sustained, cannot be reviewed by the Supreme Court, unless the record shows what amendment is proposed. *Ib.*

After a demurrer to a bill is allowed, the right to amend rests in the discretion of the court, and leave to amend will not be granted unless it is necessary to promote or attain the ends of justice. *Dowell v. Applegate*, 7 *Saw.* 232; *S. C.*, 8 *Fed. R.* 698.

### RULE XXXVI.

No demurrer or plea shall be held bad and overruled upon *Sufficiency of demurrer or plea.* argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

See Equity Rule 44.

Promulgated March 2, 1842, 1 *How.* lii.

### RULE XXXVII.

No demurrer or plea shall be held bad and overruled upon *Demurrer or plea good although answer may extend to part of same matter.* argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

See Equity Rules 32, 44.

Promulgated March 2, 1842, 1 *How.* lii.

### Decisions.

Where the defendant pleads and also files a general answer, if the answer contains more than is strictly applicable to the support of the plea, it overrules the plea. *Stearns v. Page*, 1 *Story C. C.* 204.

Generally if a defendant answer to the same matter covered by his plea, and which, in his plea, he contends he is not bound to answer, the latter overrules the former. *Ferguson v. O'Hara*, 1 *Peters C. C.* 493.

A demurrer and an answer may, under the above rule, be put in to the whole bill. (The cases of *Stearns v. Page*, and *Ferguson v. O'Hara supra*, held to be overruled by the adoption of this rule.) *Hayes v. Dayton*, 8 *Fed. R.* 702.

### RULE XXXVIII.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

Dismissal of bill on failure to reply to plea, or set down plea or demurrer for argument.

See Equity Rule 33.

Promulgated March 2, 1842, 1 How. iii.

#### Practice.

If a suit is dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground not going to the merits, the judgment will not bar another suit. *Grubb v. Clayton*, 2 *Hayw.* 378; *Walden v. Bodley*, 14 *Peters*, 156; *Huges v. U. S.*, 4 *Wall.* 252.

### RULE XXXIX.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a bona fide purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection.

tion, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

See Equity Rule 32, 59, 60, 61, 62, 63, 64, 65.

Promulgated March 2, 1842, 1 How. lxxi.

### Decisions.

It is an established rule of equity pleading, that the defendant may meet the complainant's bill by several modes of defense. He may demur, answer and plead to different parts of the bill; so that if a bill for discovery and relief contain proper matter for the one and not for the other, the defendant should answer the proper and demur to the improper matter. *Livingston v. Story*, 9 Peters, 632.

If one defense is made by answer and another by plea, the latter will be ordered to stand for an answer. In such case the plea is considered as part of the answer, and with the leave of the court, may be excepted to. *Lewis v. Baird*, 3 *McLean*, 56.

Matters of abatement, such as want of jurisdiction, incapacity of complainant to sue, etc., must be availed of by plea and not by answer. *Wylie v. Coxe*, 15 *How.* 415; *Wood v. Mann*, 1 *Sumn.* 578; *The Isaac Newton, Abb. Ad.* 11; *Wyckliffe v. Owings*, 17 *How.* 47; *U. S. v. Gillespie*, 6 *Fed. R.* 803.

The defendant is bound to answer in direct and unequivocal terms as to the state of his mind with regard to every fact stated in the bill. *Brooks v. Bryam*, 1 *Story C. C.* 296; *Taylor v. Luther*, 8 *Sumn.* 228.

An answer denying that the defendant has any knowledge of the facts charged, without adding that he has no information or belief of them, is defective. *Bradford v. Geiss*, 4 *Wash. C. C.* 513.

A defendant cannot in his answer introduce new matter in the nature of a cross bill, and require the plaintiff, and others under whom he claims, to answer it. *Hubbard v. Turner*, 2 *McLean*, 519; *Morgan v. Tipton*, 3 *Id.* 339; *Ford v. Douglas*, 5 *How.* 43.

A bill charging the defendant with liability for the act of an agent done in behalf of the defendant, in order to be fully met, must deny the authority of the agent and any subsequent ratification. *Clark v. Van Riemsdyk*, 9 *Cranch*, 153.

Where a defendant has answered generally to a matter, denying particular knowledge, he may, after acquiring particular information, file a supplemental answer introducing the new matter. *Castor v. Wood*, 1 *Baldw.* 289; *Suydam v. Truesdale*, 6 *McLean*, 459.

In a plea of purchase for valuable consideration without notice of plaintiff's title, it must be alleged that the person who conveyed was seized, or pretended to be seized, at the time of purchase. *Flagg v. Mann*, 2 *Sumn.* 586, 557.

Any affirmative relief sought by a defendant must be by cross-bill, and cannot be granted on facts stated in the answer. *Chapin v. Walker*, 6 *Fed. R.* 794.

Allegations of the bill neither admitted or denied by the answer must be proved by the complainant. *Rogers v. Marshall*, 13 *Fed. R.* 59.

#### RULE XL.

It shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery. Interrogatories not necessary, unless plaintiff wishes discovery.

Adopted December Term, 1850, 10 How. v. repealing the rule as then existing. Former rule promulgated March 2, 1842, 1 How. liii.

#### Practice.

Interrogatories are not to be framed and limited upon the theory that everything stated in the bill is precisely and in every detail true. *Chicago, St. L. & N. O. R. R. Co. v. McComb*, 2 *Fed. R.* 18.

#### RULE XLI.

(1.) The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," &c.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

Numbering and specification of interrogatories to be answered by each defendant.

(2.) If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer Answer as evidence. under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a

defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.\*

First paragraph promulgated March 2, 1842, 1 How. liv. Second paragraph added May 6, 1872, 13 Wall. ii.

#### Decisions.

Answers not responsive to the bill, and not sustained by other proof, are of no avail as evidence. *Roach v. Summers*, 20 *Wall.* 165.

The rules in equity require defendants to answer only such interrogatories as they are specifically required to answer by note to the bill. *Buerk v. Imhaeuser*, 10 *Fed. R.* 608.

Where the complainant sets down the cause for hearing on bill and answer, it is an admission that everything well pleaded in the answer is true. *Parton v. Prang*, 2 *Off. Gaz. Pat.* 619.

The complainant must overcome the denial of the defendant responsive to the bill, by the testimony of witnesses to the fact, or by witnesses and strong corroborating circumstances. *Burr v. Meyers*, 2 *McArthur*, 524.

But the rule requiring the complainant to overcome the denials of the answer does not extend to so much of the answer as is not directly responsive to the bill. *Seitz v. Mitchell*, 94 *U. S.* 580.

When the answer is responsive to the bill, the allegations therein must to entitle the complainant to relief, be sustained by the testimony of two witnesses, or of one witness corroborated by circumstances which are equivalent in weight to the testimony of another witness. *Vigel v. Hopp*, 104 *U. S.* 441.

A defendant has a right to make oath to his answers, although it is waived by the plaintiff's bill. *Holbrook v. Black*, 8 *Law Rep. N. S.* 89.

#### RULE XLII.

The note at the foot of the bill, specifying the interrogatories treated as part of the bill which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

See Equity Rules 28, 29 and 30.

Promulgated March 2, 1842, 1 How. liv.

#### Practice.

The defendant is bound to answer only such interrogatories as, by the note at the foot of the bill, he is specifically required to answer. If the

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\* Rev. Stats. sec. 858.

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## RULES OF PRACTICE IN EQUITY.

note at the foot of the bill is omitted the interrogatories may be disregarded. *Buerk v. Imhaeuser*, 10 Fed. R. 608.

### RULE XLIII.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning Form of words preceding interrogating part of bill.  
with the words : "To the end therefore," there shall hereafter be used words in the form or to the effect following : "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer ; that is to say—

"1. Whether, &c.

"2. Whether, &c."

Promulgated March 2, 1842, 1 How. liv.

### RULE XLIV.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an Defendant need not answer interrogatories if interrogatory, from answering which he demurrer would lie. might have protected himself by demurrer ; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

See Equity Rules 32, 36, 37.

Promulgated March 2, 1842, 1 How. liv.

### RULE XLV.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend, the same with or without payment of costs, as the court, or a judge thereof, may in his discretion direct.

See Equity Rules 28, 29, 30, 46, 66.

Promulgated March 2, 1842, 1 How. liv.

**Decisions.**

Where the defendant in his answer sets up new matter, and the complainant desires to give evidence to avoid or explain it, he must obtain leave to amend, as the above rule forbids a special replication. *Wilson v. Stolley*, 4 *McLean*, 275; *Marsteller v. McLean*, 7 *Cranch*, 156.

If the answer requires the complainant to vary his case, it cannot be done by replication, but must be by amendment of his bill. *Vattier v. Hinde*, 7 *Peters*, 252.

Where the statute of limitations is relied on in the answer, the complainant, in order to bring his case within an exception of the statute, must amend his bill, for the new matter cannot be set up in his replication. *Piatt v. Vattier*, 9 *Peters*, 405; *Taylor v. Benham*, 5 *How.* 233.

Where the plaintiff finds it necessary, from the answer, to prove new matter, it is necessary for him to amend his bill. But if, notwithstanding this, he puts in a special replication which may serve the purpose of a general replication, the new and special matter may be rejected as surplusage, and the replication stand as a general one. *Dupont v. Mussy*, 4 *Wash. C. C.* 128.

An objection that an amended answer was not filed by leave of the court cannot be first made in the Supreme Court. If objection is not made in the court below, it is waived. *Clements v. Moore*, 6 *Wall.* 299.

**RULE XLVI.**

In every case where an amendment shall be made after  
 In case of amendment, answer filed, the defendant shall put in a  
 defendant to file new or supplemental answer by next succeeding rule-day ; default  
 new or supplemental answer on or before the next succeeding rule-day after that on which  
 the amendment or bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court ; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

See Equity Rules 18, 19, 28, 29, 30.

| Promulgated March 2, 1842, 1 How IV.

**RULE XLVII.**

In all cases where it shall appear to the court that persons, when parties may be who might otherwise be deemed necessary omitted, or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties ; and

in such cases the decree shall be without prejudice to the rights of the absent parties.

See Equity Rule 22.

Promulgated March 2, 1842, 1 How. lv.

#### Statutory Provisions.

*Rev. Stats. sec. 737.]* Where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district within which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties that are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

*Act Mar. 3, 1875, ch. 137, sec. 8, 18 Stat. L. 470.]* When in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where the suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or when such personal service is not practicable, such order shall be published, in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within such further time, to be allowed by the court in its discretion, and upon proof of the service or publication of such order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall as regards such absent defendant or defendants without appearance, affect only the property which shall have been subject to the suit and under the jurisdiction of the court therein within such district. And when a part of said property shall be within another district of the same State, the suit may be brought within either district. Provided, however, that a defendant or defendants, not actually personally notified, may, upon entering his appearance within one year from judgment, obtain an order setting aside the judgment, and permitting him to defend, on payment of costs. (Compare Rev. Stats. sec. 738 and see decisions under Equity Rule 13.)

**Decisions.**

If a joint interest is vested in the defendants in a suit in equity, with absent parties, the court has no jurisdiction ; if the interest is separable the jurisdiction attaches. *Tobin v. Walkinshaw*, 1 *McAll.* 26.

The act of February 28, 1839 (Rev. Stats. sec. 737, *supra*) does not allow the courts to dispense with parties really essential to the merits of the controversy. *Shields v. Barrow*, 17 *How.* 130 ; *Greene v. Sisson*, 2 *Curt. C. C.* 171 ; *Winter v. Ludlow*, 3 *Phila.* 464 ; *Tobin v. Walkinshaw*, 1 *McAll.* 26.

The act has wrought no change in the jurisdiction of the circuit courts as respects the character of parties ; it only obviates difficulties arising from inability to join or serve those not liable to be sued, or not within reach of process. *The Commercial and Railroad Bank of Vicksburg v. Slocomb*, 14 *Peters.* 60.

A corporation may be sued in the State of its domicil, although some of its stockholders are not citizens of such State. *Louisville, C. & C. R. R. Co. v. Letson*, 2 *How.* 497 ; *Rundle v. Del. & Raritan Canal Co.*, 14 *How.* 95.

Where no relief can be given without taking an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, strictly speaking, yet the court will not make a decree in favor of the complainant. *Hagan v. Walker*, 14 *How.* 29.

Where it is the object of the bill to procure a sale of land and subject the proceeds to the payment of the complainant's debt, a prior incumbrancer is a necessary party : but when the existence of the prior incumbrance is admitted, and the complainant seeks only a sale, subject thereto, the court may, and, in case where his joinder would defeat the jurisdiction, will, decree such sale in the absence of the prior incumbrancer. *Ib.*

When proper parties are not within the jurisdiction, and a decree may be made without affecting their interests, the plaintiff is excused from joining them. *Union Bank of Louisiana v. Stafford*, 12 *How.* 327.

The act of February 28, 1839 (Rev. Stats. sec. 737, *supra*) does not enable a court of the United States to proceed in equity, in the absence of a party whose interests must necessarily be affected by the decree. *Northern Indiana R. R. Co. v. Mich. Cent. R. R. Co.*, 15 *How.* 233.

Neither the act of February 28, 1839 (Rev. Stats. sec. 737, *supra*) nor the 47th equity rule, enables the court to make a decree in the absence of an indispensable party, whose rights must necessarily be affected by such decree. *Shields v. Barrow*, 17 *How.* 130.

The above act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are joined because their citizenship is such that their joinder would defeat the jurisdiction, and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmation of the rule previously established in *Cameron v. McRoberts*, 3 *Wheaton*, 591, *Osborn v. Bank U. S.*, 9 *Wheaton*, 738, and *Harding v. Handy*, 11 *Wheaton*, 132. *Ib.*

While the above act removed all difficulty as to jurisdiction between competent parties regularly served with process, it does not displace that principle of jurisprudence that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court. *Ib.*

The 47th equity rule is only a declaration of the effect of the above act of Congress and the previous decisions of this court on the same subject; and it remains true, notwithstanding the act and the rule that a circuit court can make no decree affecting the rights of an absent party, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done. *Ib.*

Neither the act of Congress nor the 47th rule in equity enables a circuit court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree, and the objection may be taken at any time upon the hearing, or in the appellate court. *Coiron v. Millandon*, 19 *How.* 113.

The act of 1839 (Rev. Stats. sec. 737, *supra*) was intended so to modify the jurisdiction of the circuit court as to make it more practical and effective. Where one or more defendants sued are citizens of the State and jointly bound with citizens of other States who do not voluntarily appear, the plaintiff has a right to prosecute his suit against those served with process, but the judgment or decree does not prejudice other parties not served, and who do not appear. *Clearwater v. Meredith*, 21 *How.* 489.

Part owners or tenants in common in real estate of which partition is sought, have such an interest, inseparable from each other, that if they all cannot be subjected to the jurisdiction of the court, the suit cannot be maintained. *Barney v. Baltimore City*, 6 *Wall.* 280.

In a suit brought to enforce a lien on lands situated within the district where the suit is brought, the court may acquire jurisdiction over a citizen of another State provided he be served in the state where the suit is pending. *Ober v. Gallagher*, 93 *U. S.* 199.

In a suit by heirs at law to set aside a conveyance obtained from their ancestor by fraud and imposition, a final decree cannot be made without the presence of all the heirs as parties, if they are within the jurisdiction; but if some of them are not within the jurisdiction, and cannot be brought before the court, the court may make a decree saving the rights of the absent heirs. *Harding v. Handy*, 11 *Wheaton*, 103.

A new party made necessary by reason of some act occurring after the commencement of the suit, must be brought before the court by an original bill in the nature of a supplemental bill, inasmuch as the action is deemed original as to the new party. *Winter v. Ludlow*, 3 *Phila.* 464; *S. C.*, 16 *Leg. Int.* 332.

But if the liability or rights of a new party do not arise after the commencement of the suit, they may be brought in by amendment. *Dwight v. Humphreys*, 3 *McLean*, 104; *Shields v. Barrow*, 17 *How.* 130; *Story's Eq. Plead.* 541; *Douglas v. Butler*, 6 *Fed. R.* 228.

If the bill contains no allegations against defendants whose names

have been inserted by way of amendment, the bill must be dismissed as to them. *Andrews v. Solomon*, 1 *Peters C. C.* 356.

The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows : 1 When a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. (See Equity Rule 48.) 2. When a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. 3. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant. *Williams v. Bankhead*, 19 *Wall.* 563. See *Shields v. Barron*, 17 *How.* 130 ; *Robertson v. Carson*, 19 *Wall.* 94.

In a bill in equity by one distributee of an intestate's estate against an administrator, it is not indispensable that the other distributees be joined as parties, if the court is able to proceed to a decree and do justice to the parties before it, without injury to absent parties equally interested. *Payne v. Hook*, 7 *All.* 425.

Parties beyond the jurisdiction may be dispensed with if they are merely formal ; and although deemed necessary, if within the jurisdiction, yet if they cannot be reached with process, the suit will be maintained if a decree can be made without necessarily involving their rights. *Abbott v. American Hard Rubber Co.*, 4 *Blatch.* 489 ; *Bunce v. Gallagher*, 5 *Blatch.* 481 ; *Carson v. Robertson*, 2 *Am. L. J.* 113 ; *Gray v. Larimore*, 2 *Abb. U. S.* 542.

But the court will not proceed in the absence of a party whose interests will be affected by the decree. *Florence S. M. Co. v. Singer Mfg. Co.*, 8 *Blatch.* 113 ; *Gray v. Larimore*, 2 *Abb. U. S.* 542 ; *Bank v. Carrollton R. R.*, 11 *Wall.* 624.

Whenever the making of a person a party would oust the jurisdiction, he may be dispensed with, if a decree can be made without his presence. *The Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 *Sav.* 470.

A party interested may, on his motion or petition, be made a party by amendment of the bill. *Scott v. Mansfield, C. & L. M. R. R. Co.*, 5 *Am. L. Rec.* 436.

But a complainant cannot be compelled to add new parties to his suit, if he chooses to assume the responsibility of their not being made parties. *Searles v. Jacksonville, P. & M. R. R. Co.*, 2 *Woods*, 621.

Persons against whom no relief is prayed, and whose interest cannot be injuriously affected by the suit, need not be joined as parties. *Van Bokkelen v. Cook*, 5 *Sav.* 587.

Where infants have a contingent interest in a policy of insurance,

they are necessary parties to a bill to set aside the policy. *Equitable Life Ins. Co. v. Patterson*, 1 *Fed. R.* 126.

If a party whose presence before the court is necessary cannot be subjected to its jurisdiction, the suit cannot be maintained. *First Nat. Bk. of Hannibal v. Smith*, 6 *Fed. R.* 215; *Dormitzer v. Illinois & St. L. Bridge Co.*, *Id.* 217.

A corporation is a necessary party to a suit for collecting moneys due for unpaid assessments of its stock, or for capital once paid in but afterwards improperly divided. *Ib.*

A corporation is a necessary party defendant in a suit to enforce a judgment against it by compelling contribution from its stockholders. *Walsh v. Memphis, C. & N. R. R. Co.*, 14 *Fed. R.* 797.

All parties interested in or entitled to litigate the same question are necessary parties and must be joined if they can be brought before the court. *Taylor v. Holmes*, 14 *Fed. R.* 498.

Absent parties are not bound by any decree the court may make without their presence in a cause in which they are interested. *Coann v. Atlanta Cotton Factory*, 14 *Fed. R.* 4.

In a suit by one partner to set aside partnership transactions all the other partners are necessary parties. *Bell v. Donohue*, 17 *Fed. R.* 710.

#### RULE XLVIII.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

Promulgated March 2., 1842, 1 How. lvi.

#### Decisions.

Where the parties are very numerous or not all known, and the rigorous application of the rule requiring all to be joined would impede the purposes of justice, the court may dispense with some, and allow one or more to sue for themselves and for the benefit of the rest. *Mandeville v. Riggs*, 2 *Peters*, 482; *West v. Randall*, 2 *Mas.* 181; *Piatt v. Oliver*, 2 *McLean*, 267; *Smith v. Swornstedt*, 16 *How.* 288.

The above rule expressly reserves the rights of absent parties, and if they are dispensed with on account of being very numerous, the decree will not prevent such absent parties from afterwards litigating the same question. *Coann v. Atlanta Cotton Factory*, 14 *Fed. R.* 4.

## RULE XLIX.

In all suits concerning real estate which is vested in trustees by devise, such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate ; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit ; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

*Persons beneficially interested may be omitted.*

Promulgated March 2, 1842, 1 How. lvi.

## Decisions.

Creditors need not be joined as parties in a suit by an executor against a devisee of lands charged with the payment of debts, for an account of the trust fund. *Potter v. Gardner*, 12 Wheaton, 498.

A devisee of land in another jurisdiction need not be joined in a suit against an executor to obtain an account and payment of a legacy. *West v. Smith*, 8 How. 402.

Although it is a general rule that all persons having distinct interests must be joined as parties, yet where the interest of A. is involved in that of B., and A. has the legal title, so that the other interest may be asserted in his name, it is not necessary to bring both before the court. *Hopkerk v. Page*, 2 Brock. 20.

In a suit by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who are entitled to distribution, nor authorize a decree in their favor. If such persons do not appear before the master no decree can be made for or against them, because they would not be bound thereby ; and if they should appear they could not controvert matters outside the accounting. This must be done by proper pleadings and a regular hearing before the court. *Hook v. Payne*, 14 Wall. 252.

Where a suit, brought by a trustee to recover trust-property, or to reduce it to possession, in no wise affects his relations with his *cestuis que trust*, it is unnecessary to make them parties. *Carey v. Brown*, 92 U. S. 171.

## RULE L.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party ; but the plaintiff shall be at liberty to make

*Heir at law need not be party, unless plaintiff so elects.*

the heir at law a party where he desires to have the will established against him.

Promulgated March 2, 1842, 1 How. lvi.

### RULE LI.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto ; but the plaintiff may proceed against one or more of the persons severally liable.

Promulgated March 2, 1842, 1 How. lvi.

### Practice.

In an action against an administrator, charging fraud in the settlement of his accounts and seeking a payment of the amount due from the administrator to the heirs, his sureties may be joined as defendants with the administrator. *Payne v. Hook*, 7 Wall. 425; *Hook v. Payne*, 14 Wall. 252; *Donohue v. Roberts*, 1 Fed. R. 449.

### RULE LII.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only ; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following, (that is to say :) " Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Promulgated March 2, 1842, 1 How. lvii.

### Decisions.

An objection for want of parties is not a matter in abatement, but goes in bar of the whole bill. If the defect be fatal, it may be relied on by way of plea, or in the answer. *Tobin v. Walkinshaw*, 1 *McAll.* 26.

If parties are not properly joined, and the bill should be dismissed for that cause, it should be without prejudice. *House v. Mullen*, 22 *Wall.* 42.

Where the bill is dismissed because an absent defendant is an indispensable party, it should be without prejudice. *Kendig v. Dean*, 97 *U. S.* 423.

The above rule makes provision for such a speedy disposition of all suggestions in regard to defective parties that nothing is gained and no necessity exists for a plea. *U. S. v. Gillespie*, 6 *Fed. R.* 803.

### RULE LIII.

If a defendant shall, at the hearing of a cause, object <sup>Objection for want of</sup> that a suit is defective for want of parties not parties at hearing. having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

Promulgated March 2, 1842, 1 *How. lvi.*

#### Decisions.

The objection of misjoinder of parties should be taken by demurrer if apparent on the face of the bill, and if not apparent from the bill, then by plea or in the answer. It is too late to urge a formal objection of that kind, the first time, on the hearing of the cause. *Story v. Livingston*, 13 *Peters*, 359, 375.

An objection for want of parties must be taken by plea or answer, and the name or description of the parties who should be brought before the court must be specified. *Segee v. Thomas*, 3 *Blatch.* 11.

The objection that parties whose rights would necessarily be affected by the decree have been omitted may be taken at any time, at the hearing, or in the appellate court. *Corron v. Millandon*, 19 *How.* 130.

An objection that some of the plaintiffs have no interest in the suit cannot be first made at the hearing. *Bowman v. Wathen*, 2 *McLean*, 376; affirmed, 1 *How.* 189.

If a person not a party may be affected by the decree, and this appears at the final hearing, the court, instead of dismissing the bill, will usually retain the cause in order that he may be made a party. *Winter v. Ludlow*, 3 *Phila.* 464; *S. C.*, 16 *Leg. Int.* 332.

Inasmuch as the cause may be ordered to stand over in order that new parties may be made, a want of parties is not necessarily fatal even at the hearing. But this is not a matter of course and is rarely done, unless where, as to the new parties, the cause may stand upon the bill and answer of those who have already appeared. *West v. Randall*, 2 *Mas.* 181.

If the cause have merits, and no decree can properly be made for want of a necessary party, the Supreme Court will remand it in order to have such party brought in. *Lewis v. Darling*, 16 *How.* 1.

The court is not bound to take notice of an interest acquired in the subject matter of the suit pending litigation ; but it is common to permit one becoming interested in the questions involved in the suit during its pendency, to come in and protect his interest, if application is made within a reasonable time. *Mechanics' Bank of Alexandria v. Seton*, 1 *Peters*, 299, 310 ; *The Jenny Lind*, 3 *Blatch*. 513.

Where a misjoinder of parties is apparent on the face of the bill, an objection should be made by demurrer or answer, or it will be deemed to be waived. *Bunce v. Gallagher*, 5 *Blatch*. 481.

A demurrer is proper to reach a defect arising from the fact that a party is joined as plaintiff who has no interest in the subject matter of the suit. *Hodge v. North Mo. R. R. Co.*, 1 *Dillon*, 104.

The want of proper parties is not a sufficient ground for dismissing the bill. The suit should stand over that new parties may be made. *Mil-ligan v. Milledge*, 3 *Cranch*, 220.

Where want of parties is not relied on in the answer, it cannot avail at the hearing unless the case is one in which the court cannot proceed to a decree between the parties before it, without prejudice to the absent parties. *Wallace's Sons v. Holmes*, 5 *Fish. Pat. Cas.* 15 ; S. C., 9 *Blatch*. 65.

An objection that new parties have been introduced into the cause without order of the court cannot be first made in the Supreme Court. *Myers v. Fenner*, 5 *Wall.* 205.

Where the want of parties does not appear on the face of the bill, the objection must be made by plea or in the answer, and cannot be made for the first time in the Supreme Court. *Carey v. Brown*, 92 *U. S.* 171.

An objection that the defendants to an amended bill were all necessary parties to a supplemental bill filed in the same cause, cannot be first made in the Supreme Court. *McBurney v. Carson*, 99 *U. S.* 567.

The objection of the want of parties may be taken at any time in the progress of the cause, and even in the appellate court ; but the objection will be disregarded if it appears that the parties are not necessary, or if, although convenient, and under some circumstances necessary, they cannot be made without ousting the jurisdiction of the court. *Carson v. Robertson*, 1 *Chase Dec'n*, 475.

If there is a party on the record over whom the court has not jurisdiction, and who is not necessary to the proceedings, the bill will be dismissed as to that party, and retained as to the others. *Vose v. Reed*, 1 *Woods*, 647.

The court will not make a decree the execution of which would affect the rights of a party not before it, or throw a cloud upon his title. If such absent party is necessary to a decree, the bill will be dismissed without prejudice. *Young v. Cushing*, 4 *Biss.* 456.

Courts of equity are always unwilling to turn a complainant out of court on an objection for want of proper parties made at the final hearing. If a new party is deemed necessary to be made, leave will generally be granted that the cause stand over for that purpose. *The Townsend Savings Bank of New Haven v. Epping*, 3 *Woods*, 390.

An objection for want of parties ought not to prevail at the hearing on appeal, except when the party is indispensably necessary. *Mechanics-Bank of Alexandria v. Seton*, 1 *Peters*, 299.

Where after a cause had been set for hearing the defendant was informed that the plaintiff was a nominal one, and that the real plaintiff was a citizen of the same State with the defendant, and he immediately filed a cross-bill charging that fact, and asking a discovery, it was held that the original suit ought not to be heard until the cross-bill was answered. *Young v. Pott*, 4 *Wash. C. C.* 521.

#### RULE LIV.

Where no account, payment, conveyance, or other direct Nominal parties need relief is sought against a party to a suit, not appear unless required. not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Promulgated March 2, 1842, 1 How. lvii.

#### Decisions.

The court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties, but will rather proceed without them and decide upon the merits of the case between the parties who have the real interests before it, wherever it can be done without prejudice to the rights of others. *Wormley v. Wormley*, 8 *Wheat.* 421.

There is a distinction between active and passive parties, the former being such as are so involved in the subject in dispute that no decree can be made without their presence, while the latter are such that complete relief can be given to those who seek it, without affecting their interests. *Joy v. Wirts*, 1 *Wash. C. C.* 517.

No one need be made a party against whom, if brought in, the plaintiff could have no decree. *Van Reimsdyke v. Lane*, 1 *Gall.* 371, 630; S. C., 9 *Cranch*, 153.

Where, although, one is clearly interested in the subject-matter of the suit, nothing is asked of him by the bill, and his rights are not put in issue, and nothing can be required of him by the decree, it is not necessary to make him a party. *Society for the propagation of the Gospel v. Town of Hartland*, 2 *Paine*, 536.

## RULE LV.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be ex parte, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

*See Equity Rules 18, 19, 21, 93.*

Promulgated March 2, 1842, 1 How. lviii.

## Statutory Provisions.

*Rev. Stats. sec. 718.]* Whenever notice is given for an injunction out of the circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

*Rev. Stats. sec. 719.]* Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any circuit court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of the circuit court, in any case when a party has had reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court.

*Rev. Stats. sec. 720.]* Injunctions shall not be granted to stay proceedings in a State court, except in bankruptcy cases. (See Rev. Stats. sec. 5106.)

*Rev. Stats. sec. 736.]* All proceedings by any national banking asso

ciation to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

*Rev. Stats. sec. 3224.]* No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

*Rev. Stats. secs. 3636, 3637.]* Injunctions to restrain issuance of distress warrants against delinquent collectors of taxes, regulated.

*Rev. Stats. sec. 4921.]* The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable.

*Rev. Stats. sec. 5024.]* Injunctions may be granted in bankruptcy cases, to restrain the debtor and other persons from transferring or disposing of property. (Note. The statutes relating to bankruptcy were repealed by the act of June 7, 1878, chap. 160, 20 Stat. L. 99, to take effect September 1, 1878; but the act expressly saved pending cases, and is therefore still in force as respects them. Editor.)

*Rev. Stats. sec. 5237.]* Injunctions to restrain Comptroller of the Currency from proceeding with receiverships of national banks, in certain cases.

*Rev. Stats. sec. 5242.]* No injunction to issue from any State court against a national bank before final judgment.

*Act. Mar. 3, 1875, chap. 137, sec. 4, 18 Stat. L. 470.]* Injunctions granted by State courts in cases afterwards removed into the federal courts, to remain in full force until dissolved or modified by the court to which the suit may be removed. (Compare Rev. Stats. sec. 646.)

### Decisions.

A preliminary injunction is not a final settlement of the rights of the parties. *Day v. Boston Belting Co.*, 6 *Law Rep. N. S.* 329.

On an application for a preliminary injunction the parties do not come into court on strictly legal proofs, but with affidavits alone, on which neither party have the right of cross-examination. *Ib.*

No injunction can be granted unless special or sufficient cause be clearly shown, *Perry v. Parker*, 1 *Woodb. & M.* 280; *Lawrence v. Bowman*, 1 *McAll.* 419.

On an application for an injunction, affidavits may be heard in behalf of both parties. *Wilson v. Stolley*, 4 *McLean*, 272.

The plaintiff must rest on the case stated in the bill, where a motion for an injunction is made, but affidavits may be used to show more particularly the matter which the bill alleges, and reference may be made to collateral matters which tend to explain, support or strengthen it; and the plaintiff may in the same way contradict the statements of the defendant's affidavits. *Cooper v. Matthews*, 6 *Law Rep.* 413; *Brooks v. Bicknell*, 3 *McLean*, 250.

In patent cases a preliminary injunction will be refused if the com-

plainant's title is denied, unless long possession and previous recoveries be shown. *Perry v. Parker*, 1 *Woodb. & M.* 280.

Mere apprehension of a threatened wrong is not enough to warrant the granting of a preliminary injunction, but the danger or impending loss must be shown. *Jeuny v. Crace*, 1 *Cranch C. C.* 443; *Blackburn v. Stannard*, 5 *Law Rep.* 250.

The complainant is not entitled as a matter of right to file further affidavits in answer to those of the defendant, except in case of surprise. *Day v. Boston Belting Co.*, 6 *Law Rep. N. S.* 329.

The principles governing the courts in granting or refusing a preliminary injunction considered in the following cases: *Little v. Gould*, 2 *Blatch.* 165, 184; *Sanders v. Logan*, 2 *Pittsb.* 241; *Am. Nicholson Pavement Co. v. City of Elizabeth*, 4 *Fish. Pat. Cas.* 189; *Pattier v. Whitney*, 1 *Lew.* 87; *Middlings Purifier Co. v. Christian*, 4 *Dill.* 448; *Andrews v. Spear*, *Id.* 472.

On an application for a provisional injunction to restrain the infringement of letters patent, the court, or a judge out of court in the second circuit, has power to permit the complainant on such motion, when the defendant sets up a license in his defense, to put in proofs in rebuttal of the proofs offered by the defendant, but the defendant cannot reply to such rebutting proofs by further proofs on his part. *Day v. New England Car Spring Co.*, 3 *Blatch.* 154.

A mere denial of the equity of the bill by the answer, will not prevent the court from looking into the law and facts of the case, on a motion for a special injunction, and granting or refusing it, according to its discretion. *Clum v. Brewer*, 2 *Curt. C. C.* 506.

An answer although filed before its time will be treated as an answer, and not merely as an affidavit, on a motion for a preliminary injunction. *Brooks v. Bickwell*, 3 *McLean*, 250.

Matter of avoidance in an answer responsive to the bill on a motion for an injunction, will be deemed as the affidavit or sworn statement of the defendant. *Tobin v. Walkinshaw*, 1 *McAll.* 26.

On a motion for an injunction, the defendant may be permitted to show that the bill on its face is materially defective. *Wilson v. Stolley*, 4 *McLean*, 272.

The granting or dissolving of an injunction rests in the sound discretion of the court, and on the justice and equity of each particular case. *Tucker v. Carpenter*, 1 *Hempst.* 440; *Nelson v. Robinson*, *Ib.* 464.

After the dissolution of an injunction, if the testimony develops a case for reinstating it, it will be accordingly restored. *Tucker v. Carpenter*, 1 *Hempst.* 440.

The form of the injunction bond should be to answer all damages which the defendant may sustain in consequence of the granting of the injunction. *Bein v. Heath*, 12 *How.* 168.

An injunction allowed in the circuit court by a district judge expires at the commencement of the term next succeeding its allowance. *Gray v. Chicago, &c. R. R. Co.*, 1 *Woolw.* 63.

The judges of the Supreme Court have power to grant injunctions in vacation which do not expire with the vacation. *Ib.*

Where the answer to the bill praying an injunction denies all the material allegations of the bill, a preliminary injunction will be refused. *Shoemaker v. National Mechanics' Bank*, 1 *Hughes*, 101.

Under the statute (Rev. Stat. sec. 719, *supra*) prohibiting a Supreme Court justice from granting injunctions except within the circuit to which he is allotted, save in the case where the application cannot be heard by the circuit or district judge, &c., the absence of the circuit or district judge is equivalent to inability, and in such case the Supreme Court justice may hear an application for an injunction wherever he may be. *Searles v. Jacksonville, P. & M. R. R. Co.*, 2 *Woods*, 621.

A court of the United States cannot enjoin proceedings in a State court. *Diggs v. Wolcott*, 4 *Cranch*, 179; *Peck v. Jenness*, 7 *How.* 612.

Except in cases provided by the bankrupt law, the courts of the United States are prohibited from enjoining proceedings in a State court. *Haines v. Carpenter*, 91 *U. S.* 254.

But a suit to enjoin the execution of a judgment of a State court, originally brought in the State court and afterwards removed into the United States circuit court on the petition of one of the parties, may be maintained after such removal, and the injunction previously obtained may be continued or dissolved in the discretion of a federal court. Rev. Stats. sec. 720 (*supra*) does not apply to such cases. *Watson v. Bordurant*, 2 *Woods*, 166; *Smith v. Schwed*, 6 *Fed. R.* 455.

An injunction will not be granted nor a receiver appointed pending a plea to the jurisdiction of the court; but to guard against dilatory pleas and irreparable mischief thereby, an immediate trial of the plea will be ordered. *Ewing v. Blight*, 3 *Wall. Jr.* 139.

An injunction obtained in the State court previously to the removal of the cause into the United States circuit court, will not be dissolved after removal on the ground that the bill was insufficiently verified. *Smith v. Schwed*, 6 *Fed. R.* 455.

Where an injunction is asked for on the ground of fraud, the facts constituting the fraud must be clearly and positively averred on the knowledge of the complainant, or some other person cognizant of them of his own knowledge. Allegations on information and belief are not sufficient. *Brooks v. O'Hara*, 8 *Fed. R.* 529.

Disobedience to an injunction is a contempt of court; and it is none the less a contempt that the defendant was advised and believed that he did not so disobey. *Atlantic Giant Powder Co. v. Dittmar Powder Mfg. Co.*, 9 *Fed. R.* 316.

In order to bind persons by injunction they should be served with notice of the injunction. *In re Cary*, 10 *Fed. R.* 622.

An injunction will be issued in a proper case, although the defendant offers to give bond and security to pay damages. *McWilliams Mfg. Co. v. Blundell*, 11 *Fed. R.* 419.

In doubtful cases an injunction will not be granted prior to the final

hearing. *Illingworth v. Spaulding*, 9 Fed. R. 154; *Cross v. Livermore*, *Id.* 607; *Marks v. Corn*, 11 Fed. R. 900.

A motion to dissolve a temporary restraining order obtained *ex parte* may be made before answer. *Metropolitan G. & S. Exchange v. Chicago Board of Trade*, 15 Fed. R. 847.

Section 720, Rev. Stat. (*supra*) prohibiting the granting by a federal court of an injunction to restrain proceedings in a State court, applies only to cases pending or commenced before the jurisdiction of the federal court attached. So that an injunction may properly issue restraining parties from bringing a suit in a State court. *Live Stock Association v. Crescent City Co.*, 1 Abb. U. S. 388; *Fisk v. Union Pacific R. R. Co.*, 10 *Blatch.* 518; *The State Lottery Co. v. Fitzpatrick*, 3 *Woods*, 222.

On the dissolution of an injunction the court may in its discretion assess the damages, or remit the party aggrieved to his remedy at law. *Russell v. Farley*, 105 U. S. 433; *Lea v. Deakin*, 13 Fed. R. 514.

#### RULE LVI.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties, entitled to revive the same; which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

See Sup. Ct. Rule 15, and decisions thereunder, and Equity Rules 11, 12, 13, 14, 15, 16, 47.

Promulgated March 2, 1842, 1 How. lviii.

#### Statutory Provisions.

*Rev. Stats. sec. 955.]* When either of the parties, whether plaintiff, petitioner or defendant, dies before final judgment, the executor or administrator may, if the suit survives, prosecute or defend to final judgment. The defendant shall answer, and the cause will be heard and determined, and judgment rendered for or against the executor or administrator. If the executor or administrator neglects or refuses to become a party twenty days after being served with a scire facias, the court may nevertheless render judgment against the deceased party. The executor or administrator on becoming a party is entitled to a continuance until the next term.

*Rev. Stats. sec. 956.]* Where one of several plaintiffs or defendants dies, in an action which survives to or against the other, the writ or action shall not abate; but, upon suggestion on the record, the action shall proceed in favor of or against the surviving party.

#### Decisions.

The statute construed. Hatch *v.* Eustes, 1 *Gall.* 160; Mackie *v.* Thomas, 7 *Wheaton*, 530; Green *v.* Watkins, 6 *Id.* 260; Clarke *v.* Mathewson, 12 *Peters*, 164; Griswold *v.* Hill, 1 *Paine C. C.* 483; McCoul *v.* Lecamp, 2 *Wheaton*, 111; Richards *v.* Maryland Ins. Co. 8 *Cranch*, 84; Fitzpatrick *v.* Domingo, 14 *Fed. R.* 126. See also Thomas *v.* Police Jury, 14 *Fed. R.* 390, and note at end of case.

The death of a party does not abate a suit in equity. Fisher *v.* Rutherford, 1 *Baldw.* 188.

An abatement is merely an interruption of a suit in equity until new parties are made. Hoxie *v.* Carr, 1 *Sumner*, 173.

A bill of revivor is not the commencement of a new suit, but a continuance of the old one. Clarke *v.* Mathewson, 12 *Peters*, 164.

The sole questions before the court on a bill of revivor are the competency of the parties, and the correctness of the frame of the bill to revive, General objections to the original bill will be reserved. Bettes *v.* Dana, 2 *Sumner*, 383; Oliver *v.* Decatur, 4 *Cranch C. C.* 592.

A bill of discovery cannot be revived, if the complainant dies after answer. Horsburg *v.* Baker, 1 *Peters*, 232.

All the testimony which might have been used if no abatement had happened, may be used after the legal representatives of the original party are brought in. Vattier *v.* Hinde, 7 *Peters*, 252.

The right to a continuance to the next term is given only to the representative of the deceased party. Griswold *v.* Hill, 1 *Paine C. C.* 483; Wilson *v.* Codman, 3 *Cranch*, 103.

If a party die after a cause has been removed from a State court, the proper parties to be brought in must be determined by the practice of the federal court. Suydam *v.* Ewing, 2 *Blatch.* 359.

On the death of a party, the suit will not be revived under the above rule, unless an order is made to that effect, and in case of failure to procure such order a demurrer will be sustained. Atterbury *v.* Gill, 13 *Off. Gaz. Pat.* 276.

New matter cannot be incorporated into a bill of revivor. Mason *v.* Hartford, C. & F. R. R. Co., 10 *Fed. R.* 334.

The revivor of a suit in equity by or against the representative of a deceased party is a matter of right. Fitzpatrick *v.* Domingo, 14 *Fed. R.* 216.

#### RULE LVII.

Whenever any suit in equity shall become defective from  
<sup>1</sup> Supplemental bill, when proper. any event happening after the filing of the  
 bill, (as, for example, by change of interest

in the parties,) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant to demur, defendant shall demur, plead, or answer plead or answer by next rule-day. thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

Promulgated March 2, 1842, 1 How. lxx.

#### Decisions.

It is not necessary that the petition for leave to file a supplemental bill should embrace the averments intended to be inserted in the supplemental bill, but only that it should advise the opposite party and the court of the ground on which the relief is applied for. *Parkhurst v. Kinsman*, 1 *Blatch.* 72.

All that the court inquires into on an application for leave to file a supplemental bill is whether probable cause exists for granting the leave, and whether the petition states facts and circumstances which, if properly pleaded, would sustain a supplemental bill. *Ib.*

A supplemental bill may be filed at any stage of the cause, even after decree. *Ib.*

The court will deny a motion for leave to file a supplemental bill which seeks to make a change in the essential character and objects of the suit. *Snead v McCoul*, 12 *How.* 407.

New oral testimony, tending merely to corroborate evidence on the one side or contradict evidence on the other, on points already in issue, is not sufficient foundation for a supplemental bill. *Jenkins v. Eldridge*, 3 *Story C. C.* 299.

No new evidence is a sufficient foundation for a supplemental bill, unless it be of such a nature as would, if unanswered, require a reversal of the decree. *Ib.*

Leave to file a supplemental bill is never granted after an interlocutory decree, where the party might, by due diligence, have introduced the new matter in the original cause. *Ib.*; *Mosgrove v. Kountze*, 14 *Fed. R.* 315.

New parties made necessary by an event happening after the filing of the original bill, may be brought before the court by supplemental bill. *Chester v. Life Association of America*, 4 *Fed. R.* 487.

A bill of revivor cannot be amended by the insertion of new matter happening since it was filed. *Mason v. Hartford, P. & F. R. R. Co.*, 10 *Fed. R.* 334.

A supplemental bill will not be allowed merely because the complain-

ant does not wish to continue some of the parties. *Mosgrove v. Kountze*, 14 Fed. R. 315.

Upon filing a supplemental bill, a subpœna is not required unless new parties are made. A rule to answer the supplemental bill directed to the parties already served is sufficient. *Shaw v. Bill*, 95 U. S. 10.

### RULE LVIII.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in original suit need not be set forth in the original suit, unless the special circumstances of the case may require it.

Promulgated March 2, 1842, 1 How. lxx.

### RULE LIX.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory.

*See Equity Rules 39, 91.*

Promulgated March 2, 1842, 1 How. lxx.

### Statutory Provisions.

*Rev. Stats. sec. 725.]* The courts of the United States shall have power to administer all necessary oaths.

*Act August 15, 1876, chap. 304, 19 Stat. L. 206.]* Notaries public are authorized to take acknowledgments, affidavits, etc., to be used in the United States courts, with same effect as commissioners of the circuit courts.

### Decisions.

An answer or other pleading cannot be treated as a nullity because not properly verified. The practice is to apply for an order setting it aside for irregularity. *Ewing v. Blight*, 3 Phila. 576; S. C., 12 Leg. Int. 335.

If the verification does not show the authority of the officer before whom taken, it is irregular. *Addison v. Duckett*, 1 *Cranch C. C.* 349.

The signature of counsel must be attached to an answer. *Davis v. Davidson*, 4 *McLean*, 136.

### RULE LX.

After an answer is put in, it may be amended, as of course,

in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit ; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

Promulgated March 2, 1842, 1 How. lxx.

#### Statutory Provisions.

*Rev. Stats. sec. 754.]* The courts of the United States may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as they may, in their discretion, or by rules, prescribe.

#### Decisions.

Applications to amend an answer are in the discretion of the court, and are viewed more favorably than applications to substitute a new answer. *Castor v. Wood*, 1 *Baldw.* 289.

If the defendant request leave to amend by alleging new matter inconsistent with the original answer, the court will require very cogent reasons for granting it. *Smith v. Babcock*, 3 *Sumner*, 583.

An application for an amendment seeking to set up a new defense which, with due diligence, might have been inserted in the answer, must be supported by good cause. *The India Rubber Co. v. Phelps*, 8 *Blatch.* 85.

An amendment which repeats what was contained in the answer already filed without varying the defense, may be treated as impertinent. *Grier v. Gregg*, 4 *McLean*, 202.

Leave to amend an answer will be denied, if the new fact sought to be introduced was known to the defendant at the time the answer was filed. *Cross v. Morgan*, 6 *Fed. R.* 241.

If the general replication treats an answer as denying matter alleged in the bill, leave will not be given to amend the answer unless sufficient reason be shown. *Gardner v. Crossman*, 11 *Fed. R.* 851.

Where a defendant has answered generally to a matter, denying particular knowledge, he may, after acquiring particular information, file a supplemental answer introducing the new matter. *Castor v. Wood*, 1 *Baldw.* 289 ; *Suydam v. Truesdale*, 6 *McLean*, 459.

## RULE LXI.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

See Equity Rule 39.

Promulgated March 2, 1842, 1 How. lx.

## Decisions.

Pleadings in equity are viewed without regard to form, and exceptions are never allowed if made under circumstances calculated to effect surprise. *Surget v. Byers*, 1 *Hempst.* 715.

The complainant may file exceptions to the answer for insufficiency, even after he has excepted for impertinence. *Patriotic Bank v. Bank of Washington*, 5 *Cranch C. C.* 602.

The fact that the defendant does not answer an immaterial allegation of the bill does not furnish a ground for exception to the answer. *Hardeman v. Harris*, 7 *How.* 726.

Exceptions to an answer should state the charges in the bill, and the interrogatory applicable thereto, if any, to which the answer relates, and then the terms of the answer if full, so that the court may at once perceive the ground of the exception, and ascertain its sufficiency. *Brooks v. Byam*, 1 *Story*, 296.

Where one defense is made by answer and another by plea, the latter will be ordered to stand for an answer, and as the plea in such case is treated as part of the answer, it may, with the permission of the court, be excepted to. *Lewis v. Baird*, 3 *McLean*, 56.

If an amended answer contain the same matter set up in the original answer without varying the defense, it may be excepted to for impertinence, and referred to a master. *Grier v. Gregg*, 4 *McLean*, 202.

The courts give the answer a liberal construction on the hearing of exceptions. *Griswold v. Hill*, 1 *Paine*, 390.

If the plaintiff is not satisfied with the answer to an interrogatory, it is the special office on an exception, and not of a demurrer, to raise the question whether the answer is sufficient. *The Chicago, St. L. & N. O. R. R. Co. v. Macomb*, 2 *Fed. R.* 18.

An exception is not the only way to test the sufficiency or regularity of an amended or supplemental answer. If the pleading be irregular or contain improper matter, it may be ordered off the files. *Allis v. Stowell*, 5 *Fed. R.* 203.

A substantive defense, not responsive to the plaintiff's inquiry in his bill, is not the subject of an exception. That form of objection applies

only to an insufficient discovery, or to scandal and impertinence. Adams *v.* Bridgwater Iron Co., 6 *Fed. R.* 149.

There is no regular authorized method of pleading, like a demurrer, to test the legal validity of part of an answer; but possibly, on motion, some order might be taken to dispose of part of the case in the first instance, if it should be found that great delay and expense might thereby be avoided. *Ib.*

### RULE LXII.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, <sup>Costs for separate answers not allowed to same solicitor.</sup> the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

See Equity Rule 39.

Promulgated March 2, 1842, 1 How. ix.

### RULE LXIII.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

See Equity Rule 39.

Promulgated March 2, 1842, 1 How. ix.

### Practice.

Exceptions must be set down on a rule-day for hearing before the court. A reference of such exceptions on a day not a rule-day, and to a master instead of a judge of the court, is, unless cured by some subsequent action by the court, an abandonment of the exceptions. *La Vega v. Lapsley*, 1 *Woods*, 428.

## RULE LXIV.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

See Equity Rule 39.

Promulgated March 2, 1842, 1 How. lxi.

## RULE LXV.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

See Equity Rule 39.

Promulgated March 2, 1842, 1 How. lxi.

## RULE LXVI.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed nunc pro-

tunc, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

See Equity Rule 45.

Promulgated March 2, 1842, 1 How. lxi.

### Decisions.

If the complainant does not file the general replication, the answer is to be taken as true, and no evidence can be given by the complainant to contradict it. *Gallagher v. Roberts*, 1 Wash. C. C. 320; *Peirce v. West*, 1 Peters C. C. 351.

But where the complainant sets the cause down for hearing on bill and answer, he may afterwards obtain leave to file a general replication and take testimony. *Pierce v. West*, 1 Peters C. C. 351.

Where the answer is such as to require the complainant to make new allegations, it cannot be done by replication, but must be by amendment of the bill. *Vattier v. Hinde*, 7 Peters, 252.

A replication to a pleading is an admission of its legal sufficiency as a defense, if true. *Hughes v. Blake*, 6 Wheaton, 453; S. C., 1 Mas. 515.

If a statute is pleaded in the answer, and the complainant desires to bring himself within an exception of the statute, he must amend his bill. Otherwise the existence of the exception is not in issue. *Piatt v. Vattier*, 9 Peters, 405; *Taylor v. Benham*, 5 How. 233; *Marsteller v. McClean*, 7 Cranch, 156.

The practice now is, when the plaintiff finds it necessary, from the answer, to prove new matter, to amend his bill. *Dupont v. Mussy*, 4 Wash. C. C. 128.

If a special replication containing all the essential qualities of a general replication, be filed, it will, notwithstanding the rule forbidding the filing of special replications, (Equity Rule 45,) be treated as a general replication, the special matter being rejected as surplusage. *Ib.*

After a cause is finally heard on bill and answer, and the bill is dismissed, leave will not be given to the complainant to file a general replication and take testimony, where no mistake or inadvertence is suggested. *Bullinger v. Mackey*, 14 Blatch. 355.

Where a cause is submitted for final decree on pleadings and proofs, and it transpires that no replication was filed, but the evidence was taken as if it had been filed, the court will still try the case on its merits, and will allow a replication to be filed at once. *Jones v. Brittan*, 1 Woods, 667.

If the replication is not filed in time, an order may be entered, of course, in the clerk's office, without application to or action by the judge, dismissing the bill for such want of replication. *Robinson v. Satterlee*, 3 Saw. 184.

The dismissal of a bill for the want of a replication is final unless set aside by the court on application duly made within the proper time, and pursuant to the rule. *Ib.*

A motion to set aside the dismissal of a bill for neglect to file the

general replication, made nearly five years after the entry of the order of dismissal, without excusing the delay, will be denied. *Ib.*

The complainant must reply to the separate answer of each defendant, without reference to the state of the cause or of the pleadings with regard to any other defendant. *Coleman v. Martin*, 6 *Blatch.* 291.

The replication must be a general one, as Equity Rule 45 abolishes special replications. *Ib.*

It is an irregularity to go to a hearing without a replication to the answer. *Washington R. R. v. Bradleys*, 10 *Wall.* 299.

A general replication denies every allegation in the answer not responsive to the bill. The defendant must, therefore, prove such allegations. *Humes v. Scruggs*, 94 *U. S.* 22.

When an equity cause was heard upon bill, answer and proofs, the want of a formal replication cannot, on appeal, be assigned for error. *Nat. Bank v. Ins. Co.*, 104 *U. S.* 54.

A cause will not be dismissed for want of a replication to an amended answer, where a motion is pending to strike such answer from the files. *Allis v. Stowell*, 5 *Fed. R.* 203.

Although a replication is filed without leave, after the expiration of the time for filing, it may still, in the discretion of the court, be ordered to stand. *Fishcher v. Hayes*, 6 *Fed. R.* 76; *S. C.*, 19 *Blatch.* 26.

The purpose of a general replication is to put in issue new matter set up in the answer; but a complainant does not thereby deprive himself of the benefit of admissions in the answer. *Caveuder v. Cavender*, 8 *Fed. R.* 641.

A special replication setting up new matter, will, on motion, be ordered stricken out. *Mason v. Hartford, Prov. & F. R. R. Co.*, 10 *Fed. R.* 334

#### RULE LXVII.

(1.) After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories, filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time,

Commissioners. the commission may issue ex parte. In all cases, the commissioner or commissioners shall be named by the court, or by a judge thereof.\*

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\* Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule. (December Term, 1854, 17 How. vii.)

(2.) Either party may give notice to the other that he desires the evidence to be adduced in the cause Evidence may be taken orally at option of either party. to be taken orally, and thereupon all the witnesses to be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any ; and such examination shall take place in the presence of the parties, How examination to be conducted. or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be Depositions to be taken down in writing by examiner; form, etc. taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances ; and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend ; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same ; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit ; and any question or questions which may be objected to shall be Examiner not to rule on objections to questions. noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions ; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

(3.) In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same Refusal of witness to attend or be sworn. practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

(4.) Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors, Notice of examination to be given to opposite or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

(5.) When the examination of witnesses before the exami-

Original depositions to  
be filed. ner is concluded, the original deposition, au-  
thenticated by the signature of the examiner,  
shall be transmitted by him to the clerk of the court, to be  
there filed of record, in the same mode as prescribed in the  
thirtieth section of act of Congress, September 24, 1789.\*

(6.) Testimony may be taken on commission in the usual  
way, by written interrogatories and cross-  
taken by written in-  
terrogatories. interrogatories, on motion to the court in  
term time, or to a judge in vacation, for special reasons satis-  
factory to the court or judge.

(7.) Where the evidence to be adduced in a cause is to be  
Court may assign time taken orally, as provided in the order passed  
for taking testimony. at the December term, 1861,† amending the  
67th General Rule, the court may, on motion of either party,  
assign a time within which the complainant shall take his evi-  
dence in support of the bill, and a time thereafter within  
which the defendant shall take his evidence in defense, and a  
time thereafter within which the complainant shall take his  
evidence in reply ; and no further evidence shall be taken in  
the cause, unless by agreement of the parties, or by leave of  
court first obtained, on motion, for cause shown.

See Equity Rules, 68, 69, 70, 71, 78, 79, 80, 81, 91.

First paragraph promulgated March 2, 1842, 1 How. lxii ; amended December Term,  
1854, 17 How. vii. Second, third, fourth, fifth and sixth paragraphs promulgated De-  
cember Term, 1861, 1 Black, vi. Seventh paragraph promulgated December Term, 1869,  
9 Wall. vii.

#### Statutory Provisions.

*Rev. Stats. sec. 862.]* The mode of proof in causes of equity shall be  
according to the rules now or hereafter prescribed by the Supreme Court,  
except as herein specially provided.

*Rev. Stats. sec. 917.]* The Supreme Court shall have power to pre-  
scribe from time to time, and in a manner not inconsistent with any law  
of the United States, the modes of taking and obtaining evidence, of  
obtaining discovery, etc., in suits in equity by the circuit and district  
courts.

*Rev. Stats. sec. 858.]* No witness shall be excluded on account of  
color, or in any civil action because he is a party to or interested in the  
issue tried ; but in actions by or against executors, administrators or  
guardians, in which judgment may be rendered for or against them,  
neither party shall be allowed to testify against the other, as to any trans-  
action with, or statement by, the testator, intestate, or ward, unless called  
to testify thereto by the opposite party, or required to testify thereto by

\* Rev. Stats. sec. 865, noted under Equity Rule 70, *post*.

† Vide paragraphs 2, 3, 4, 5 and 6 of this rule.

the court. In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses.

*Rev. Stats. sec. 876.]* Subpoenas for witnesses required to attend any court of the United States, in any district, may run into any other district, provided in civil causes the witnesses living out of the district where the court is held do not live at a greater distance than one hundred miles. (See Rev. Stats. sec. 870, *post.*)

*Rev. Stats. sec. 868.]* How witnesses subpoenaed to appear before commissioner;—punishment for disobedience. (See also Equity Rule 78.)

*Rev. Stats. sec. 869.]* Subpoena duces tecum to witness before commissioner;—punishment for disobedience.

*Rev. Stats. sec. 870.]* No witness under two preceding sections required to attend out of county of his residence, nor more than forty miles from his residence; and not guilty of contempt for non-attendance unless his fees are paid or tendered on service of subpoena.

#### Decisions.

The previous statute allowing the oral examination of witnesses in open court in equity causes was not expressly repealed until the adoption of Rev. Stats. sec. 862, providing that the mode of proof in such cases should be as prescribed by the Supreme Court, except as otherwise provided. *Blease v. Garlington*, 92 U. S. 1.

While this court does not say that, even since the Rev. Stats., the circuit courts may not in their discretion, under the operation of existing rules, permit the examination of witnesses orally in open court upon the hearing, it does say that they are not now by law required to do so. (*Overruling Sickles v. Gloucester Co.*, 3 Wall. Jr. 186.) *Ib.*

If witnesses are examined orally at the hearing, the testimony presented in that form must be taken down, or its substance stated in writing and made a part of the record, or it will be entirely disregarded on appeal. *Ib.*

An examiner may be appointed outside as well as within the jurisdiction of the court. *N. C. R. R. Co. v. Drew*, 3 Woods, 693.

All the interrogatories annexed to a commission, including the general interrogatory, must be substantially answered, or the deposition cannot be read. *Ketland v. Bissett*, 1 Wash. C. C. 144; *Dodge v. Israel*, 4 *Id.* 323; *Richardson v. Golden*, 3 *Id.* 109; *Rhodes v. Selin*, 4 *Id.* 715.

If interrogatories refer to records which speak for themselves, they need not be answered. *Bell v. Davidson*, 3 Wash. C. C. 328.

Under equity rule 67 as amended, if neither party gives notice that he desires the evidence to be taken orally, then the testimony may be taken by commission, as formerly, even where the witnesses are within the reach of the subpoena of the court. *Bischoffsheim v. Baltzer*, 10 *Fed. R. 1.*

A party may cross-examine a witness orally in a foreign county although the other party chooses to send out written interrogatories. *Ib.* (But see *Stein v. Bowman*, 13 *Peters*, 209.)

After a party has given notice that he desires the evidence to be ad-

duced in the cause to be taken orally, the testimony is not, except for special reasons, to be taken otherwise, and by analogy, where testimony in a foreign country can be taken orally, it ought not, except for special reasons, to be taken otherwise. *Ib.*

If the defendant will not pay the examiner's fees and take up and file the proofs taken on his behalf, the plaintiff may do so. But no order can be made compelling the defendant to do so, *Frese v. Biedenfeld*, 14 *Blatch.* 402.

The method in equity of taking testimony of witnesses within the jurisdiction is either by an examination in open court, or upon a commission with written interrogatories annexed, unless dispensed with by the parties, when the examination is made by deposition, waiving the commission and written interrogatories. *Bronson v. La Crosse & M. R. R. Co.*, 9 *Am. Law Reg.* 350.

Oral testimony will not be received at the hearing of a cause, unless to prove exhibits referred to by the bill or answer. *De Butts v. Bacon*, 1 *Cranch C. C.* 569.

Where the complainant examines the defendant, he does not thereby estop himself from denying the truth of the evidence given by the respondent. *Rison v. Cribbs*, 1 *Dillon*, 181.

Where the proofs taken on the part of the defendant are not filed because the examiner's fees are not paid, the plaintiff cannot compel the defendant to pay the fees, but the cause may proceed without the testimony in behalf of the defendant, or the plaintiff may be entitled to have it filed on paying such fees himself. *Frese v. Biedenfeld*, 14 *Blatch.* 402.

It is not a ground for suppressing a deposition that the interrogatories were shown to the witness before he was called upon to testify. *North Carolina R. R. Co. v. Drew*, 3 *Woods*, 691.

But if the answers of witnesses are prepared in writing by their counsel in advance, it will be fatal to the deposition. *Ib.*

Where a suit in equity is set down for hearing on the pleadings, no testimony having been taken, the plaintiff cannot on the hearing introduce in evidence documents which are not made, by proper reference, a portion of the bill. *Robinson Tobacco Co. v. Philips*, 20 *Blatch.* 569.

Testimony of parties, if competent when the depositions were taken and filed, remains competent, and the subsequent death of a party, and the continuation of the suit by an administrator, do not affect its use on the trial. *Scheidley v. Aultman*, 18 *Fed. R.* 666.

### RULE LXVIII.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress.\* But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under

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\* Rev. Stats., secs. 866, 868, 869, 870, 871, 872, 873, 875.

a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

See Equity Rule 70.

Promulgated March 2, 1842, 1 How. lxii.

### Statutory Provisions.

*Rev. Stats. sec. 866.]* In any case when it is necessary to prevent a failure or delay of justice, any of the courts of the United States may grant a *deditus postestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States.

*Rev. Stats. sec. 867.]* Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam*, which would be admissible in a court of the State where such cause is pending.

*Rev. Stats. sec. 868.]* How witnesses subpoenaed to appear before commissioner;—punishment for disobedience.

*Rev. Stats. sec. 869.]* Subpoena duces tecum to witnesses before commissioner;—punishment for disobedience.

*Rev. Stats. sec. 870.]* No witness under two preceding sections required to attend out of county of his residence, nor more than forty miles from his residence; and not guilty of contempt for non-attendance unless his fees are paid or tendered on service of subpoena.

*Rev. Stats. sec. 871.]* Depositions in the District of Columbia in suits pending elsewhere.

*Rev. Stats. sec. 872.]* Same subject; where no commission nor notice.

*Rev. Stats. sec. 873.]* Same subject; manner of taking and transmitting depositions.

*Rev. Stats. sec. 875.]* Letters rogatory in cases in which the United States are parties or interested. (See also Rev. Stats. secs. 4071, 4072, 4073, 4074.)

*Rev. Stats. sec. 876.]* Subpoenas to witnesses to run into another district, if witness does not reside at greater distance than one hundred miles. (See Rev. Stats. sec. 870, *supra*.)

### Decisions.

Depositions may be taken under a *deditus postestatem* under Rev. Stats., sec. 866, "according to common usage," now, as at any time hitherto, in a suit in equity. The words "common usage," in regard to a suit in equity, refer to the practice in courts of equity. *Bischoffsheim v. Baltzer*, 10 Fed. R. 1; S. C., 20 *Blatch.* 229.

The provision of equity rule 68, for taking testimony in an equity

case, after it is at issue, by deposition, according to the acts of Congress, is still in force. *Ib.*

The sections of Rev. Stats. relating to the taking of depositions de bene esse do not apply to the taking of testimony under a dedimus protestatem. *Jones v. Oregon Cent. R. R. Co.*, 3 *Saw.* 523.

The testimony of a witness may be taken in perpetuam rei memoriam in a patent cause, although no suit has been commenced, and the party moving for the deposition cannot bring his rights to a judicial determination. *N. Y. & Balto. Coffee Polishing Co. v. N. Y. Coffee Polishing Co., Limited*, 20 *Blatch.* 174 ; S. C., 11 *Fed. R.* 813.

Where testimony in a foreign country can be taken orally, it ought not, except for special reasons, to be taken otherwise. *Bischoffsheim v. Baltzer*, 20 *Blatch.* 229 ; S. C., 10 *Fed. R.* 1.

The plaintiff in an equity suit having applied for an order for a commission to examine himself on written interrogatories to be annexed to the commission, on an affidavit showing that he expected to prove by himself the material averments of the bill, or many of them, the court allowed the defendant to cross-examine him orally. *Ib.*

#### RULE LXIX.

Three months, and no more, shall be allowed for the taking Limitation of time for of testimony after the cause is at issue, unless taking testimony.

the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time ; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of Publication of deposi- the commissions and depositions containing tions.

the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances ; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

See Equity Rule 67, par. 7.

| Promulgated March 2, 1842, 1 *How. lxxii.*

#### Decisions.

A deed or other documentary exhibit may be put in evidence after publication of the depositions. *Nesmith v. Calvert*, 1 *Woodb. & M.* 34.

The practice in regard to enlarging time for taking depositions, and reopening case for further testimony after publication, with reasons for same, stated at length. *Wood v. Mann*, 2 *Sumner*, 316. ✕

The three months allowed by the above rule for taking testimony has

reference to the taking of testimony by both parties. *Ingle v. Jones*, 9 *Wall.* 486.

Where a plaintiff has taken his testimony within the three months allowed, the bill will not be dismissed. *Sergeant v. First Nat. Bank*, 7 *Reporter*, 231.

If the defendant will not pay the examiner's fees and take up and file the proofs taken on his behalf, the plaintiff may do so. But the defendant cannot be compelled by order to do so. *Frese v. Beidenfeld*, 14 *Blatch.* 402.

Testimony taken after the three months limitation has expired may still be admitted at the hearing, in the discretion of the court. *Fisher v. Hayes*, 6 *Fed. R.* 76.

Equity rule 69 is imperative that no testimony taken after the time allowed shall be read at the hearing. *Wooster v. Clark*, 9 *Fed. R.* 854.

The time to take testimony will be extended when such testimony, if admissible, will apply equally to other cases in which the time to take proofs has not expired, *Wooster v. Howe Mach. Co.*, 10 *Fed. R.* 666.

#### RULE LXX.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of <sup>When</sup> ~~bene esse~~ <sup>may be taken;</sup> the plaintiff's witnesses are aged and infirm, <sup>notice.</sup> or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses <sup>de bene esse</sup>, upon giving due notice to the adverse party of the time and place of taking his testimony.

See Equity Rules 67, 68.

Promulgated March 2, 1842, 1 How. lxiii.

#### Statutory Provisions.

*Rev. Stats.* sec. 863.] Depositions <sup>de bene esse</sup> may be taken when witness lives at a greater distance than one hundred miles, or bound on a voyage to sea, or about to go out of the United States to a greater distance than one hundred miles from place of trial, or when ancient and infirm ;—before whom deposition may be taken ;—notice ;—same in case of proceedings in rem ;—witnesses compelled to appear same as in court. (As to persons before whom depositions may be taken see *Rev. Stats.* secs. 1750, 1778, and Act Aug. 6, 1876, ch. 304, 19 Stat. L. 206.)

*Rev. Stats.* sec. 864.] Witness to be sworn ;—testimony to be reduced to writing by magistrate, or witness in magistrate's presence, and by no other person ;—to be subscribed by deponent.

*Rev. Stats.* sec. 865.] Magistrate to retain deposition until delivered with his own hand into court, or transmit the same under seal and with

certificate of reasons for taking, and in such case same to remain under seal until opened in court. But deposition cannot be read unless causes of taking proved to exist at time of trial.

#### Decisions.

Depositions de bene esse being in derogation of the common law should be so taken as to comply strictly with all the requisites of the statute, or the testimony cannot be used. *Bell v. Morrison*, 1 *Peters*, 351; *Harris v. Wall*, 7 *How.* 693; *Allen v. Blunt*, 2 *Woodb. & M.* 121; *Carrington v. Stimpson*, 1 *Curt.* 437.

It is not necessary to state the names of all the parties to the suit in the caption of the depositions. *Eghert v. Citizens, Ins. Co. of Mo.*, 7 *Fed. R.* 47.

If the caption shows that the distance from the place of trial is more than one hundred miles, and the same is true in fact, and known to the parties, it is a sufficient statement of the reason for taking the deposition. *Ib.*

The adverse party may place the deponent on the stand as a witness though his deposition de bene esse has been regularly taken. *Whiteford v. Clark Co.*, 13 *Fed. R.* 837.

Depositions de bene esse under Rev. Stat. sec. 863, cannot be taken in a foreign country. The proper course is by commission, and the cases appear to allow an oral examination of witnesses. *Cortes v. Tanphauser*, 18 *Fed. R.* 667.

#### RULE LXXI.

The last interrogatory in the written interrogatories to take <sup>Form of last interrogatory.</sup> testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea set forth the same fully and at large in your answer."

Promulgated March 2, 1842, 1 *How. Ixiii.*

#### RULE LXXII.

Where a defendant in equity files a cross-bill for discovery <sup>Defendant must answer original bill before plaintiff required to answer cross-bill for discovery; use of answer to cross-bill.</sup> only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill.

The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing,

in the same manner and under the same restrictions as the answer praying relief may now be read and used.

Promulgated March 2, 1842, 1 How. lxiv.

### Decisions.

A cross-bill is brought by the defendant against the plaintiff in the same suit, or against other defendants, or against both, touching the matters in the original bill. Its object is to obtain a discovery in defense of the original bill, or to obtain full relief to all parties as to the matters alleged in the original bill. It is auxiliary to the original suit and dependent upon it, and should, therefore, not introduce new and distinct matters not embraced in the original bill. *Ayres v. Carver*, 17 *How.* 591.

If the purpose of a cross-bill be different from that of the original bill, it cannot be maintained, although it contain matters having connection with the same general subject. *Cross v. De Valle*, 1 *Wall.* 5.

A defendant must answer the original bill before filing a cross-bill. *Allen v. Allen*, 1 *Hempst.* 58.

A cross-bill cannot be used to introduce new parties into the cause. *Shields v. Barrow*, 17 *How.* 130.

A cross-bill should ordinarily be heard with the original bill. *Ayres v. Carver*, 17 *How.* 591.

It is irregular to file a cross-bill without leave of the court; and such a proceeding may be set aside. *Bronson v. La Crosse R. R. Co.*, 2 *Wall.* 283.

Where the parties are all before the court full justice may generally be done without requiring the defendants to file a cross-bill. *Bank v. Union Bank of Tenn.*, 13 *How.* 57. (See *Young v. Pott*, 4 *Wash.* 521; *Carnochan v. Christie*, 11 *Wheaton*, 446.)

A defendant cannot introduce matter in the nature of a cross-bill by his answer. *Hubbard v. Turner*, 2 *McLean*, 519; *Morgan v. Tipton*, 3 *Id.* 339; *Ford v. Douglas*, 5 *How.* 143; *Mo. v. Iowa*, 7 *How.* 660.

A petition "by way of cross-bill," which makes nobody defendant, prays for no process, and under which no process is issued, is a nullity. *Washington R. R. v. Bradleys*, 10 *Wall.* 299.

A cross-bill must grow out of the matter alleged in the original bill, and is used to bring the whole matter in dispute before the court, so that there may be a complete decree touching the subject matter of the suit. *Ex parte R. R. Co.*, 95 *U. S.* 221.

In cases where the cross-bill is filed to restrain proceedings at law, and also where the defendant in the cross-bill resides beyond the jurisdiction of the court, service of the subpœna may be made on the defendant's attorney. *Lowenstein v. Glidewell*, 5 *Dillon*, 325; *S. C.*, 6 *Reporter*, 454.

The dismissal of an original bill by the plaintiff does not put a cross-bill out of court. *Ib.*

A cross-bill is properly filed to establish an equitable title, when the legal title is in the complainant. *Brandon Mfg. Co. v. Prime*, 14 *Blatch.* 371.

Other parties than the defendants to the original bill may be joined in the cross-bill. *Ib.*

If a cross-bill is filed by one defendant without notice to the others, it will be stricken from the files. *Webster Loom Co. v. Short*, 10 *Off. Gaz. Pat.* 1019.

Any affirmative relief sought by a defendant in equity must be by cross-bill, and can never be granted upon facts stated in the answer. *Chapin v. Walker*, 6 *Fed. R.* 794.

In a suit by a corporation a cross-bill for discovery cannot be sustained against an officer of the corporation when he did not derive the information sought in his official capacity. *McComb v. Chicago, St. L. & N. O. R. Co.*, 7 *Fed. R.* 426.

Instead of filing a bill or cross-bill for discovery, either party may now during the progress of the cause by affidavit and motion require the opposite party to produce books or papers pertinent to the subject under inquiry. *Coit v. N. C. Gold Amalgamating Co.*, 9 *Fed. R.* 577.

A controversy between co-defendants to a bill in equity cannot be the matter of a cross-bill, unless its settlement is necessary to a complete decree upon the case made by the original bill. *Weaver v. Alter*, 3 *Woods*, 152.

#### RULE LXXIII.

Every decree for an account of the personal estate of a <sup>Account of personal</sup> testator or intestate shall contain a direction <sub>estate of decedant.</sub> to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

Promulgated March 2, 1842, 1 How. lxiv.

#### RULE LXXIV.

Whenever any reference of any matter is made to a master <sup>Party procuring refer-</sup> to examine and report thereon, the party at <sub>ence to proceed by next</sub> rule-day. whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for hearing on or before the next rule-day succeeding the time when the reference was made ; if he shall omit to do

Default. so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Promulgated March 2, 1842, 1 How. lxiv.

#### Decisions.

A complex or intricate account ought always to be referred to a master. *St. Colombe v. U. S.*, 7 *Peters*, 625 ; *Harding v. Handy*, 11 *Wheaton*, 103 ; *Jewett v. Cunard*, 3 *Woodb. & M.* 277.

The order of reference need not particularly empower the master to take testimony, for that is implied, if necessary. *Story v. Livingston*, 13 *Peters*, 359.

A cause may be referred back to a master. *Union Sugar Refinery v. Mathieson*, 3 *Cliff.* 146; *Magic Ruffle Co. v. Elm City Co.*, 14 *Blatch.* 109.

Practice before master in patent cases stated. *Kerosene Lamp Heater Co. v. Fisher*, 1 *Fed. R.* 91.

Practice before master, generally, as to examining parties, stated. *Foote v. Silby*, 3 *Blatch.* 504.

The issues made by the pleadings must be settled by a decree before a reference to a master can be had. *Ward v. Paducah & M. R. R. Co.*, 4 *Fed. R.* 862.

#### RULE LXXV.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time <sup>Procedure before master.</sup>

and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

See Equity Rule 77.

Promulgated March 2, 1842, 1 How. lxiv.

#### RULE LXXVI.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited. But such state of facts, charges, affidavits, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, or answer were so brought in or used.

Report of master, what omitted from, etc.

Promulgated March 2, 1842, 1 How. lxv.

## RULE LXXVII.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Promulgated March 2, 1842, 1 How. lxxv.

## Decisions.

The practice before masters as to examining parties stated. *Foote v. Silby*, 3 *Blatch.* 507.

Practice before masters in patent cases stated. *Kerosene Lamp Heater Co. v. Fisher*, 1 *Fed. R.* 91.

An oral examination before a master without a previous agreement of the parties waiving written interrogatories, is irregular. *Van Hook v. Pendleton*, 2 *Blatch.* 85.

But if a party is notified of an oral examination, and acquiesces in it, he waives his right to require written interrogatories. *Ib.*

The oath of a party as to items of the account ought not to be received, if from their nature they are capable of full proof. *Harding v. Handy* 11 *Wheaton*, 103, 127.

Witnesses who have been examined before the court cannot be again examined before the master without order, and then only as to other matters. *Jenkins v. Eldredge*, 3 *Story C. C.* 299.

A complainant does not preclude himself from taking a decree by examining the defendant before a master. *Jenkins v. Greenwald*, 1 *Bond*, 126, 133.

The above rule prescribes a simple and expeditious practice, and reference to the practice of the English chancery is no longer necessary. *Hatch v. Indianapolis & S. R. R. Co.*, 9 *Fed. R.* 856.

Masters have no right to review, reject or disregard the decision, order

or direction of the court contained in the decretal order by which they are appointed, but they are bound to follow all such orders and directions. *Felch v. Hooper*, 4 *Cliff.* 489.

### RULE LXXVIII.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court ; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

Promulgated March 2, 1842, 1 How. lxxvi.

### Decisions.

A witness who has been examined in the cause before the court cannot be examined before the master without leave of the court. *Gass v. Stinson* ; *Jenkins v. Eldredge*, 3 *Story C. C.* 299.

If leave is granted to examine a witness before a master who has been already examined before the court, his testimony must relate to new matters. *Ib.*

A court of equity will not sit to try causes by the examination of witnesses in open session. Such is not the proper construction of equity rule 78. *North Carolina R. R. Co. v. Drew*, 3 *Woods*, 691.

This rule only reserves the power in the court to verify documents set out in the pleadings, or to establish some fact of a formal character which may have been inadvertently omitted in the evidence, and which does not require an extended examination. In other words, the seventy-eighth rule does not alter the English practice on the subject. The substantial evidence in the case must be taken according to equity rule sixty-seven.

*Ib.*

## RULE LXXIX.

All parties accounting before a master shall bring in their respective accounts in the form of debtor to produce accounts; and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall Examination viva voce, be at liberty to examine the accounting etc. party viva voce, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

Promulgated March 2, 1842, 1 How. lxvi.

## Practice.

The old mode of proving an account item by item is abolished by this rule. *Pullian v. Pullian*, 10 Fed. R. 23.

## RULE LXXX.

All affidavits, depositions, and documents which have Evidence previously been previously made, read, or used in the used in court may be read before master. court, upon any proceeding in any cause or matter, may be used before the master.

Promulgated March 2, 1842, 1 How. lxvi.

## RULE LXXXI.

The master shall be at liberty to examine any creditor or Master may examine other person coming in to claim before him, creditor or other claim- either upon written interrogatories or viva ant. voce, or in both modes, as the nature of the case may appear to require. The evidence upon such examinations shall be Evidence to be taken taken down by the master, or by some other down. person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

Promulgated March 2, 1842, 1 How. lxvi.

## RULE LXXXII

The circuit courts may appoint standing masters in Appointment of mas- chancery in their respective districts, both ters. the judges concurring in the appointment; and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master

Compensation. in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, hav-

ing regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Promulgated March 2, 1842, 1 How. lxvii.

Not to retain report,  
but may have attachment  
for his fees.

#### Statutory Provisions.

*Act Mar. 3, 1879, chap. 183, 20 Stat. L. 415.]* No clerk of the district or circuit courts of the United States, or their deputies, shall be appointed a receiver or a master in any case, except where the judge of said court shall determine that special reasons exist therefor to be assigned in the order of appointment.

#### Practice.

Special services of a master should be compensated by special allowance. *Erie Railway Co. v. Heath*, 10 *Blatch.* 214.

### RULE LXXXIII.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of Where master's report  
to be returned. the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions Time to file exceptions. thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed Report confirmed, if no exceptions. on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session, or, if not, then at the next sitting of Hearing of exceptions  
filed. the court which shall be held thereafter, by adjournment or otherwise.

Promulgated March 2, 1842, 1 How. lxvii.

#### Decisions.

Like a verdict of a jury, the report of a master relates only to facts, and as to them will not be reconsidered or set aside, unless some clear mistake or abuse appears. *Mason v. Crosby*, 3 *Woodb. & M.* 258.

Although the presumption is in favor of the report of a master, it

may nevertheless be examined by the court. *Webb v. Powers*, 2 *Woodb. & M.* 497.

If the master has erred in some respects, it will afford no ground for setting aside or recommitting his report, if the errors complained of do not appear to have produced results materially different from what would have otherwise happened. *Mason v. Crosby*, 3 *Woodb. & M.* 258.

The master cannot, even with the consent of the parties, go into matters not embraced in the suit and referred to him. *Gordon v. Hobart*, 2 *Story C. C.* 243.

Questions arising upon accounts will not be determined previous to the incoming of the master's report, when they must be brought before the court on exceptions regularly taken. *Vanderwick v. Summerl*, 2 *Wash. C. C.* 41.

If no exceptions are taken by the parties, the court, at the hearing, will notice only such errors as appear from the face of the report itself. *Himley v. Rose*, 5 *Cranch*, 313.

Exceptions should be taken before the master, in order to save time and give him an opportunity to correct his errors and reconsider his opinions, and if a party neglect this rule he cannot afterwards except to the report, unless the court be dissatisfied with the report and refer it back with leave to the party to take exceptions. *Story v. Livingston*, 13 *Peters*, 359.

At the final hearing on exceptions to a master's report the whole case is open for revision, and if the court changes its opinion previously formed, it may overrule the interlocutory decree and the proceedings under it. *Fourniquet v. Perkins*, 16 *How.* 82; *Pulliam v. Pulliam*, 10 *Fed. R.* 53.

Exceptions to a master's report are in the nature of a special demurrer and the party objecting must point out the errors, otherwise the report will be treated as correct. *Story v. Livingston*, 13 *Peters*, 359.

The court does not investigate the items of an account, or review the whole mass of testimony taken by the master. Therefore, the exceptions are regarded by the court only so far as they are supported by the special statements of the master, or by direct references to particular portions of testimony on which the party excepting relies. *Harding v. Handy*, 11 *Wheaton*, 103.

It is not necessary for the court to formally allow or disallow the exceptions, if the record shows that they were all considered and acted on. *Oliver v. Piatt*, 3 *How.* 333.

Exceptions to a master's report are not required to be so full and specific as a special demurrer, it being only necessary that the exception should point out the finding and conclusion of the master, and when so made it brings up all questions of fact and law relative to that subject. *Foster v. Goddard*, 1 *Black*, 506.

Exceptions must point out article by article, the parts of the report excepted to. *Green v. Bishop*, 1 *Cliff. C. C.* 186.

If the master makes a ruling which the party intends to contest, an exception should be taken on the spot, and, though it need not there be

drawn up in form, it should be taken by giving notice to the master whose duty it is to note the same in his minutes. *The Troy Iron & Nail Factory v. Corning*, 6 *Blatch.* 328.

The practice of excepting to the rulings of the master on the admission or rejection of evidence, considered. *Ib.*

When a master, on reference, has followed the order of the judgment and enforced its directions, no objection can be taken on appeal to what he has done, when the appeal arises upon exceptions to his report, and not on objection to the original judgment under which the reference to him was made. *New Orleans v. Gaines*, 15 *Wall.* 624.

The practice with regard to making up of master's reports and hearing arguments thereon and exceptions thereto, considered. *Hatch v. Indianapolis & S. R. R. Co.*, 9 *Fed. R.* 856.

Courts of equity may, in certain cases, give the parties a new hearing but nothing of that kind will be allowed in a hearing on exceptions to a master's report. *Fitch v. Hooper*, 4 *Cliff.* 489.

Exceptions to the report of the master should be precise and raise well defined issues. When they are vague and general, and require of the court the performance of duties which properly belong to the master and counsel, they will be overruled. *Stanton v. Alabama & C. R. R. Co.*, 2 *Woods*, 506.

The presumptions are in favor of the findings of the master, and they will not be disturbed, unless shown to be erroneous. *Lockhart v. Horn*, 3 *Woods*, 542.

#### RULE LXXXIV.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, Costs to prevent exceptions for frivolous causes. the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs ; the cost to be fixed in each case by the court, by a standing rule of the circuit court.

Promulgated March 2, 1842, 1 How. lxxviii.

#### RULE LXXXV.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, Clerical and other mistakes, how and when corrected. may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

See Equity Rules 5, 8, 9, 10.

Promulgated March 2, 1842, 1 How. lxxviii.

**Decisions.**

A decree will not be amended after four years have elapsed since its rendition. *Coleman v. Neill*, 11 *Fed. R.* 461.

Though the court cannot change the essential parts of a decree after the term at which it was entered, yet it has power subsequently to amend the decree as to the mode of its execution. *Turner v. The Indianapolis B. & W. R. R. Co* 8 *Biss* 386.

**RULE LXXXVI.**

In drawing up decrees and orders, neither the bill, nor what to be omitted answer, nor other pleadings, nor any part from decree. thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order ; but the decree and order shall begin, in

form. substance, as follows : "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel ; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz :" [Here insert the decree or order.]

See Equity Rules 5, 8, 9, 10.

Promulgated March 2, 1842, 1 How. lxviii.

**Decisions.**

By the practice in England, the decree always recites the substance of the pleadings and facts upon which the court bases its decree, but the practice is otherwise in the United States. *Whiting v. Bank U. S.*, 13 *Peters*, 6.

A decree is final which disposes of the whole subject, gives all the relief contemplated, and leaves nothing to be done by the court. On the other hand a decree which leaves anything to be done by the court, is interlocutory. These are the only two classes of decrees. *Ryan v. McLeod*, 9 *Reporter*, 493.

Where a bill is dismissed without prejudice, the complainant is not barred from bringing a new bill against other parties on the same claim, or against the same parties, on new or additional facts. *Kimball v. The County of Mobile*, 3 *Woods*, 555.

**RULE LXXXVII.**

Guardians ad litem to defend a suit may be appointed by Guardians ad litem and the court, or by any judge thereof, for infants prochein amis. or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their prochein ami ; subject, however, to such

orders as the court may direct for the protection of infants and other persons.

Promulgated March 2, 1842, 1 How. lxxviii.

#### Decisions.

The husband may properly be joined as prochein ami in a bill by the wife to be relieved of a contract by her on the ground of disability to contract. *Bein v. Heath*, 6 *How.* 228.

The duty of watching over the interests of infant defendants devolves in a great degree on the court. *Bank U. S. v. Ritchie*, 8 *Peters*, 128.

The guardian appointed is usually the nearest relative not interested in the matter in suit. *Ib.*

It is not proper to appoint a guardian ad litem on motion of the adverse counsel, without bringing the minors into court, or issuing a commission to make the appointment. *Ib.*

A decree should not be rendered upon the answer of a guardian ad litem consenting to a decree without other evidence. *Ib.*

In a suit by a married woman, her husband should be joined in all cases when they have no antagonistic interests; but if their interests are opposed, she should file her bill by her next friend, and make her husband a party defendant. *Birn v. Heath*, 6 *How.* 248; *Douglas v. Butler*, 6 *Fed. R.* 228.

But if the bill by the wife join her husband as complainant when he ought to be a defendant, the practice is not to dismiss the bill, but to give permission to the wife to amend by adding a next friend, and make the husband a defendant. *Douglas v. Butler*, 6 *Fed. R.* 228.

A married woman must sue and be sued jointly with her husband, except when she claims a right in opposition to him, in which case her prochein ami, with her consent, may sue on her behalf, and her husband be made a defendant. *Taylor v. Holmes*, 14 *Fed. R.* 498.

A decree will be reversed if rendered against a woman who is shown by the bill to be both a minor and feme covert, when no appearance by or for her has been entered, and no guardian ad litem appointed. *O'Hara v. MacConnell*, 93 *U. S.* 150.

#### RULE LXXXVIII.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the

Petition for rehearing, how framed.  
No rehearing after term, when appeal lies.  
Aliter in other cases.

petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Promulgated March 2, 1842, 1 How. ixix.

### Decisions.

A rehearing is not a matter of right, but rests in the sound discretion of the court. *Daniel v. Mitchell*, 1 *Story*, 198.

A rehearing is only allowed where some plain omission or mistake has been made, or where matter material to the decree has been overlooked. *Jenkins v. Eldredge*, 3 *Story*, 299; *Emerson v. Davies*, 1 *Woodb. & M.* 21; *Tufts v. Tufts*, 3 *Id.* 426.

Where, after an interlocutory decree, a rehearing is asked because of newly discovered evidence, it will be granted on filing a supplemental bill, if the evidence would entitle the party to relief on a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree, but not otherwise. *Baker v. Whiting*, 1 *Story*, 218; *Jenkins v. Eldredge*, 3 *Id.* 299.

A rehearing will not be granted on the ground of newly discovered evidence where it is merely cumulative upon the facts already in issue and litigated. *Ib.*

A rehearing in equity will be granted for very nearly the same reason as a new trial at law. *Bently v. Phelps*, 3 *Woodb. & M.* 403.

If the rehearing is sought on newly discovered evidence, and it seems to be cumulative, and not to have been introduced before, on account of neglect, the application will be denied. *Ib.*

In a case where no appeal lies to the Supreme Court, a rehearing may be granted if the petition is filed before the end of the next term after the final decree. *Clarke v. Threlkeld*, 2 *Oranch C. C.* 408.

A rehearing will not be granted on the mere certificate of counsel as to the sufficiency of the reason for it. *Emerson v. Davies*, 1 *Woodb. & M.* 21; *Tufts v. Tufts*, 3 *Id.* 426.

Mistake of law or error of judgment on the part of counsel as to pertinency of force of evidence, furnishes no ground for a rehearing. *Baker v. Whiting*, 1 *Story*, 218.

A party is not entitled to a rehearing on the ground of newly discovered evidence, if he had knowledge of the evidence before the decree, or might, with reasonable diligence or enquiry, have obtained it. *Ib.*

A rehearing will not be granted on the ground that sufficient attention and argument was not given to the evidence or a particular portion of it. *Hunter v. Town of Marlborough*, 2 *Woodb. & M.* 168, 205.

An application for a rehearing generally must state that new testimony has been discovered since the opinion was pronounced, or give some reason which constitutes a good ground for a new trial at law. *Ib.*

A rehearing will not be granted because some of the evidence on the other side to a point was not specially referred to in the opinion of the court, if it was argued by counsel on both sides and considered by the court. *Bently v. Phelps*, 3 *Woodb. & M.* 403.

A rehearing cannot be granted after the term at which the decree was rendered in a case when an appeal lies to the Supreme Court. *Roemer v. Simon*, 91 U. S. 149; *Scott v. Blaine*, 1 *Baldw.* 287; *Barker v. Stowe*, 16 *Off. Gaz. Pat.* 807.

The Supreme Court cannot set aside a decree and grant a rehearing. *Roemer v. Simon*, 91 U. S. 149.

An application for a rehearing must be made to the court that rendered the decree. *Ib.*

A rehearing may be granted at any time before a final decree. *Reeves v. Keystone Bridge Co.*, 9 *Off. Gaz. Pat.* 885.

The practice where a rehearing is sought before final decree is to file a petition for leave to make a supplemental bill, setting forth the newly discovered evidence, and for a rehearing of the cause at the time when the supplemental bill may be ready for hearing; and the court must be satisfied that the omission to sooner produce the evidence is not due to negligence, and it must also appear that the new evidence is material. *Ib.*

The granting or refusal of a rehearing is in the sound discretion of the court, and furnishes no ground for an appeal. *Buffington v. Harvey*, 95 U. S. 99.

An affidavit in support of a motion for a rehearing which states that every effort was made to obtain the testimony sought to be introduced but the party "was not aware that he could do so," and which fails to state what efforts were made, or that the party visited any of the places mentioned or saw any of the persons named in the proposed new testimony, is insufficient. *Ib.*

A rehearing in a suit for infringement of a patent will not be granted because on the final hearing, the defendant was not prepared with proper expert testimony; nor because he has discovered that an earlier patent than complainant's has been reissued since the hearing; nor for newly discovered evidence, except on proof that the party could not, by due diligence, have obtained it for the hearing. *Hitchcock v. Tremaine*, 5 *Fish. Pat. Cases*, 537.

After the term at which a final judgment or decree is entered, the courts of the United States have no power to open the judgment or decree and grant a rehearing, or let a defendant in to answer, unless at the time the judgment or decree is entered some order is made virtually keeping the judgment open for further relief or proceedings. *Linder v. Lewis*, 1 *Fed. R.* 378.

A petition signed and verified by the solicitor of a corporation asking for a rehearing on the ground of newly discovered evidence, denied for insufficiency under the circumstances of the case. *Page v. Holmes Burglar Alarm Telegraph Co.*, 2 *Fed. R.* 330.

An application for a rehearing should not be made ex parte. *Giant Powder Co.*, 5 *Fed. R.* 197.

If the petition for a rehearing be filed during the term, the court will retain jurisdiction over the case, and may subsequently decide on the application. *Ib.*

The practice on an application for a rehearing considered. *Ib.*

When it is clear that the proposed new evidence on a motion to reopen a case will not change the result, a rehearing will not be granted. *Adair v. Thayer*, 7 Fed. R. 920.

Unless the proposed new evidence would vary the case, and probably lead to a different result, a rehearing will be denied. *McClosky v. DuBois*, 9 Fed. R. 38; *Munson v. The Mayor*, 11 Fed. R. 72.

Where the defendant does not state that the evidence sought to be introduced on a rehearing was not accessible at the trial, or that it was not known to him, or that it is material, a rehearing will be denied. *Vermont Farm Machine Co. v. Converse*, 19 Fed. R. 825.

As all questions are open at the final hearing, it is unnecessary to petition for a rehearing on an interlocutory decree. *Pulliam v. Pulliam*, 10 Fed. R. 53.

A rehearing will not be granted on the ground that the decision should have been made on every issue presented, where the court has passed upon all issues necessary to determine the rights of the parties. *Martindale v. Waas*, 11 Fed. R. 551.

Due and reasonable diligence to procure the testimony before the hearing must be shown to entitle a party to a rehearing on the ground of newly discovered evidence, and the facts and circumstances showing such diligence must appear. *Gillette v. Bate Refrigerator Co.*, 12 Fed. R. 108.

The practice on applications for rehearing suggested. *Ib.*

An application for a rehearing on the ground of newly discovered evidence will be denied where the newly discovered evidence is merely cumulative. *Rogers v. Marshall*, 13 Fed. R. 59.

If a rehearing is granted to admit additional proof, the decree should stand pending the rehearing. *Rogers v. Marshall*, 15 Fed. R. 193.

But where the rehearing is ordered because the court is inclined to doubt the correctness of the decree, the proper practice is to set aside such decree until the case is again heard. *Ib.*

A decree taken by default in consequence of the neglect of counsel for the defendant, will not be opened on notice for a rehearing. *Scott v. Hare*, 1 *Hughes*, 163.

The 88th equity rule is imperative, and the circuit courts have no power to set aside their decrees, and grant a rehearing, after the term at which they are rendered, in cases when an appeal lies to the Supreme Court. *Ib.*

#### RULE LXXXIX.

The circuit courts (both judges concurring therein) may Cirenit Courts may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

**Decisions.**

The Supreme Court has the power to prescribe the forms of writs and process, and to regulate the whole practice in suits in equity in the circuit courts ; but any circuit court in any manner not inconsistent with any law of the United States, or any rule prescribed by the Supreme Court, may regulate its own practice in any manner it may deem proper to the advancement of justice. *Steam Stone Cutter Co. v. Jones*, 18 *Fed. R.* 567 ; *Phila. & Trenton R. R. v. Stimpson*, 14 *Peters*, 448.

No practice of the circuit court inconsistent with the rules prescribed by the Supreme Court can prevail. *Bank U. S. v. White*, 8 *Peters*, 262.

Every court of equity has power to mould its rules in relation to the time and manner of appearing and answering, and the rules of the Supreme Court were not intended to abridge this power. *Poultney v. Lafayette*, 12 *Peters*, 472.

Any rule may be waived or modified in its operation for good reasons. *Russell v. McClellan*, 3 *Woodb. & M.* 157.

**RULE XC.**

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Practice of the high court of chancery in England in cases not provided for by rules.

Promulgated March 2, 1842, 1 How. lxix.

**Decisions.**

The general powers vested in the Supreme Court prescribe the adoption of that practice in equity and admiralty which is founded on the custom and usages of courts of equity and admiralty ; but it is still authorized to make such deviations as are necessary to adapt its process and rules to the peculiar circumstances of the country, subject to the interposition, alteration and control of congress. *Grayson v. Virginia*, 3 *Dall.* 320.

The equity practice, in the courts of the United States, when not controlled by an act of Congress, or rules prescribed by the Supreme Court, is in general regulated by the chancery practice of England, as it existed prior to the adoption of what are called the "new rules." *Goodyear v. Prov. Rubber Co.*, 2 *Fish.* 499 ; *S. C.*, 2 *Cliff.* 351 ; *Blackburn v. Selma R. R. Co.*, 3 *Fed. R.* 689.

The Supreme Court rules are obligatory in Louisiana. *Story v. Livingston*, 13 *Peters*, 359.

It is the practice of the English Chancery and not that of the Exchequer, which governs when these rules are silent. *Smith v. Burnham, 2 Sumner, 612.*

State laws relating to practice do not affect the courts of the United States proceeding in equity, *Mayer v. Foulkrod, 4 Wash. 349; U. S. v. Curry, 6 How. 106; Dow v. Chamberlin, 5 McLean, 281; Blease v. Garlington, 92 U. S. 1.*

Equity rule 90 neither enlarges nor limits the equitable jurisdiction of the United States courts, but merely regulates the practice in those cases wherein the court has jurisdiction under the constitution and laws of the United States in particulars not otherwise specially provided by rule. *Lewis v. Shainwald, 7 Sawyer, 403.*

### RULE XCI.

Whenever, under these rules, an oath is or may be required <sup>Affirmation in lieu of</sup> to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Promulgated March 2, 1842, 1 How. lxix.

### RULE XCII.

In suits in equity for the foreclosure of mortgages in the <sup>Execution in foreclos-</sup> circuit courts of the United States, or in any <sup>ure cases.</sup> court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Promulgated April 18, 1864, 1 Wall. vii.

### Practice.

A valid foreclosure of a mortgage given by a railroad company may be made, although part of the property mortgaged may lie out of the territorial jurisdiction of the court. *Muller v. Dows, 94 U. S. 444.*

The power of the court to put the purchaser of mortgaged premises into possession by writ of assistance, or summary proceedings, extends only to the parties to the suit and those coming in after suit commenced. *Thompson v. Smith, 1 Dillon, 458.*

**RULE XCIII.**

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

*Suspension or modification of injunction pending appeal.*

See Equity Rule 55.

Promulgated Jan. 13, 1879, 97 U. S. vii.

**Practice.**

Rule 30 of the Supreme Court applies only to cases appealed before the adoption of this rule and is now practically obsolete. Application to modify an injunction must now be made under this rule. *White v. Dunbar*, 26 *Off. Gaz. Pat.*, 353.

**RULE XCIV.**

Every bill brought by one or more stock-holders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

*Bill brought by stock-holders against corporation, what to contain.*

Promulgated Jan. 23, 1882, 104 U. S. ix.

**Decisions.**

In a suit brought by a shareholder against a corporation and its directors for an alleged act ultra vires, there must appear: (1.) Some action or threatened action of the directors or trustees which is beyond the authority conferred by the charter or the law under which the company was organized ; or (2.) Such a fraudulent transaction completed or threatened by them, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or to the other shareholders ; or (3.) That the directors, or a majority of them, are

acting for their own interests in a manner destructive of the company, or of the rights of the other shareholders ; or (4.) That the majority of the shareholders are oppressively and illegally pursuing in the name of the company a course in violation of the rights of the other shareholders, which can only be restrained by a court of equity. And (5) it must also appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that the ownership of the stock was vested in him at the time of the transactions of which he complains, or was thereafter transferred to him by operation of law. *Hawes v. Oakland*, 94 U. S. 450 ; *Huntington v. Palmer*, *Id.* 482 ; *Dannmeyer v. Coleman*, 8 *Saw.* 51 ; S. C., 11 *Fed. R.* 97 ; *Bell v. Donohue*, 17 *Fed. R.* 710.

Although a stockholder may bring a suit when the corporation refuses, yet, as in such case the suit can be maintained only on the ground that the rights of the corporation are involved, the corporation should be made a party to the suit, and a demurrer will lie if it is not so made. *Davenport v. Dows*, 18 *Wall.* 626 ; *Bell v. Donohue*, 17 *Fed. R.* 710.

It is not necessary for a plaintiff corporation to allege that it is a corporation in the pleading. It is sufficient to state in the commencement of the declaration the name of the corporation, just as the name of a person suing is stated. And, unless the existence of the corporation is challenged, it is not necessary to prove that it is a corporation. *Union Cement Co. v. Noble*, 15 *Fed. R.* 502.

An individual stockholder can maintain a suit against the corporation only when it is made to appear to the court that he has exhausted all the means to obtain, within the corporation itself, the redress of his complaint, or action in conformity with his wishes, and that he has made proper effort to induce action on the part of the other stockholders. *Bill v. Western Union Telegraph Co.*, 16 *Fed. R.* 14.

RULES OF PRACTICE  
FOR  
THE COURTS OF ADMIRALTY  
OF  
THE UNITED STATES.\*

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RULE I.

No mesne process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the

No process shall issue until libel or information filed.  
Service.

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\* The district courts have exclusive jurisdiction of admiralty causes and seizures on land, saving a common law remedy when competent, and excepting where jurisdiction is given to the circuit courts. Also of prizes, except as provided in Rev. Stats. sec. 629. Rev. Stats. sec. 563, par. 8.

The trial of all issues of fact in the district courts except in equity and admiralty, etc., shall be by jury. In admiralty and maritime causes relating to contract or tort arising upon or concerning any vessel of twenty tons burthen or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it. Rev. Stats. sec. 566. (See Act February 16, 1875, ch. 77, sec. 1, 18 S. L. 315, noted *post*.)

The district courts, as courts of admiralty, shall be deemed always open for filing pleadings, issuing and returning process, and making interlocutory motions, orders, rules and other proceedings preparatory to hearing of causes on the merits. And any district judge may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. Rev. Stats. sec. 574.

Business of district court certified to circuit court in case of disability of district judge. Rev. Stats. secs. 587, 588, 589.

When the business of a district court is certified into the circuit court on account of the disability of the district judge, preparatory examinations and orders in admiralty cases may be made by the clerk. Rev. Stats. sec. 590.

marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

See Admiralty Rules 22, 23, 41.

Promulgated December Term, 1844, 3 How. iii.

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District judge designated to perform duties of disabled judge. Rev. Stats. sec. 591.

Designation of another judge in case of accumulation of business. Rev. Stats. sec. 592.

When designation of another judge to be by chief justice of the United States. Rev. Stats. sec. 593.

Revocation and new appointment in cases provided by three preceding sections. Rev. Stats. sec. 594.

Duty of district judge to comply with designation and appointment. Rev. Stats. sec. 595.

Designation of district judge, when public interest requires, to hold court in place or aid of other district judge. Rev. Stats. sec. 596.

Writs of prohibition may be issued by the Supreme Court to district court when proceeding as courts of admiralty and maritime jurisdiction. Rev. Stats. sec. 688.

The courts of the United States have exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. Rev. Stats. sec. 711, par. 3.

The mode of proof in causes of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein provided. (See various provisions of Rev. Stats. relating to depositions.) Rev. Stats. sec. 862.

The forms of mesne process and the forms and modes of proceeding in suits of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of admiralty, except as otherwise provided by statute or by rules. Rev. Stats. sec. 913.

The Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceedings to obtain relief, of drawing up, entering and enrolling of decrees, etc., and generally to regulate the whole practice in equity and admiralty in the circuit and district courts. Rev. Stats. sec. 917.

The several circuit courts may regulate their own practice in any manner not inconsistent with law or the rules prescribed by the Supreme Court. Rev. Stats. sec. 918.

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The jurisdiction of the federal courts in admiralty and maritime causes is given in general terms by the Constitution, and the extent of it is to be ascertained by a reasonable and just construction of the words used when taken in connection with the whole instrument. No State can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. The St. Lawrence, 1 *Black*, 522; The Lottawanna, 21 *Wall.* 558.

The admiralty jurisdiction of the federal courts, as granted by the Constitution, is not limited to tide-water, but extends wherever vessels float and navigation successfully aids commerce. The Genesee Chief, 12 *How.* 443; The Hine *v.* Trevor, 4 *Wall.* 555.

The general system of maritime law which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, was intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all causes of admiralty and maritime jurisdiction." The Lottawanna, 21 *Wall.* 558.

Congress has given the Supreme Court the authority to alter and change the forms and modes of proceeding in admiralty and maritime causes; but this power only relates

**Statutory Provisions.**

*Rev. Stats. sec. 787.]* It shall be the duty of the marshal in each district to attend the district and circuit courts when sitting therein, and to execute throughout the district all lawful precepts directed to him and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.

*Rev. Stats. sec. 790.]* Marshal and deputy shall have power after removal from office, or expiration of term, to execute all process in their hands at time of removal or expiration of term.

*Rev. Stats. sec. 911.]* All writs and process issuing from courts of the United States shall be under the seal of the court from which issued, and shall be signed by the clerk thereof.

*Rev. Stats. sec. 912.]* All process issued from the courts of the United States shall bear teste from the day of such issue.

*Rev. Stats. sec. 913.]* The forms of mesne process in suits of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of admiralty, except as otherwise provided by statute or by rules.

*Rev. Stats. sec. 922.]* Where the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.

*Rev. Stats. sec. 948.]* Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process, when the defect has not prejudiced, and the amendment will not injure, the party against whom issued.

*Rev. Stats. sec. 4063.]* Process against foreign ministers, and their domestics, void.

*Rev. Stats. sec. 4064.]* Penalty for suing out or issuing process against foreign ministers or domestics.

*Rev. Stats. sec. 4065.]* In what cases process may issue against persons in service of foreign ministers.

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to procedure, and if the general law is to be altered it must be by Congress. *The St. Lawrence*, 1 *Black*, 522; *The Lottawanna*, 21 *Wall*. 558.

The grant of admiralty jurisdiction to the Federal courts is exclusive of the State courts, and State statutes conferring jurisdiction in rem over marine contracts and torts are void. *The Hine v. Trevor*, 4 *Wall*. 556.

The courts of the United States cannot enlarge or diminish their jurisdiction by a rule of practice, but they have power over their own process and mode of procedure, and may alter the same at their will. *The St. Lawrence*, 1 *Black*, 522.

The Supreme Court has no power by a rule of practice to repeal or modify any regulation of Congress on the same subject. *The Kentucky*, 4 *Blatch*. 448.

The rules in admiralty prescribed by the Supreme Court are not regarded as restrictive, but as enumerating the more common remedies. *Gates v. Johnson*, 11 *Monthly Law Rep. N. S.* 279.

A rule of practice established pursuant to an act of Congress, has the same force and effect as a statute. *Scott v. The Propeller Young America*, 1 *Newb. Ad.* 107.

The rules established by the Supreme Court are rules of practice, not of decision. *The Selt*, 3 *Biss.* 344.

**Decisions.**

Service of process is necessary to enable the court to exercise jurisdiction. *Walden v. Craig*, 14 *Peters*, 147.

A libel in rem against a vessel and personally against her master may, under the present practice, be properly joined. *Newell v. Norton*, 3 *Wall.* 257.

Admiralty process, both on the instance and prize sides of the court, can be served on land as well as on water. *U. S. v. Coombs*, 12 *Peters*, 72.

The distinction between proceedings in rem and in personam discussed, and their history reviewed. *The Merchant*, 1 *Abb. Ad.* 1.

The libel should be sworn to, before process can issue for the arrest of person or property. *Martin v. Walker*, 1 *Abb. Ad.* 579.

If the libel proceeds against the owners and the vessel at the same time, it is irregular. *Dean v. Bates*, 2 *Woodb. & M.* 87.

The joinder in the same libel of a proceeding in rem against the ship, and in personam against the owner, is not admissible. *Ward v. The Ogdensburg*, 1 *Newb. Ad.* 139.

It is not necessary, under the above rule, that process should be served by the marshal, or his regularly appointed deputy, but a special deputy may be appointed by the marshal for the particular case. *The E. W. Gorgas*, 10 *Ben.* 460.

The marshal may under the judiciary act of 1789 (Rev. Stats. secs. 790, 954) after the expiration of his term of office, amend his return to any process which was in his hands when he went out of office. *Cushing v. Laird*, 4 *Ben.* 70.

**RULE II.**

In suits in personam, the mesne process may be by a simple warrant of arrest. warrant of arrest of the person of the defendant, in the nature of a writ of attachment, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for ; or if such property cannot be found, to attach his

Attachments. credits and effects to the amount sued for in the hands of the garnishees named therein ; or by a simple motion, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

See Admiralty Rules 3, 37, 47.

Promulgated December Term, 1844, 3 How. iii.

**Statutory Provisions.**

Rev. Stats. sec. 990.] Imprisonment for debt abolished according to laws of State in which courts of the United States respectively held.

*Rev. Stats. sec. 991.]* Discharge from arrest on mesne or final process to be according to laws of State in which courts of the United States respectively held, but proceedings to be had before one or more commissioners of circuit court.

*Rev. Stats. sec. 992.]* Privileges of jail limits to be same as in case of process from courts of State when United States courts respectively held.

*Rev. Stats. sec. 739.]* No person shall be arrested in one district for trial in another in any civil action before a circuit or district court, except in the cases enumerated. (See act Mar. 3, 1875, ch. 137, sec. 1, 18 Stat. L. 470.)

*Rev. Stats. sec. 4063.]* Process against foreign ministers, and their domestics, void.

*Rev. Stats. sec. 4064.]* Penalty for suing out or issuing process against foreign ministers or domestics.

*Rev. Stats. sec. 4065.]* In what cases process may issue against persons in service of foreign ministers.

#### Decisions.

An attachment may issue against the goods, rights and credits of a defendant in the hands of a third person to compel an appearance of the defendant, and the property attached may be condemned to satisfy the libellant's claim. *Manro v. Almeida*, 10 *Wheaton*, 473.

It is not necessary that the property should be specified in the libel in order that an attachment may issue. *Ib.*

The district courts of the United States, as courts of admiralty, may award attachments against the property of a foreign corporation found within their local jurisdiction. *Clarke v. N. J. Steam Nav. Co.*, 1 *Story*, 531.

Admiralty rules 2 and 3 give parties the right to a warrant of arrest, and to the advantage of bail to satisfy the final decree rendered in the case. *Marshall v. Bazin*, 7 *N. Y. Leg. Obs.* 342. (But see *La. Ins. Co. v. Nickerson*, 2 *Low.* 310; *The Carolina*, 14 *Red. R.* 424, and admiralty rule 47.)

Where the defendant is not found within the district, and his property has been attached, in a suit in personam, the decree will be only against the property attached. And if the property consists of specific articles, the court will order a sale, but only of the right of the debtor. *Boyd v. Urquhart*, 1 *Sprague*, 423.

Notwithstanding the judiciary act of 1789 (Rev. Stats. sec. 739) providing that suits shall not be brought against an inhabitant of the United States in any other district than that of which he is an inhabitant, or found at the time of serving the writ, the district courts, sitting in admiralty, can obtain jurisdiction in personam against an inhabitant of the United States not residing within the district, by attachment of the goods or property of such inhabitant found within the district. *Atkins v. The Disintegrating Co.*, 18 *Wall.* 272; *S. C.*, 1 *Ben.* 118.

-- And likewise an attachment, to compel appearance and obtain juris-

diction, may issue against a corporation organized or created by a State not within the district in which the suit was brought. *Ib.*

An attachment of the property of a defendant who is not an inhabitant of the United States, and is not found within the district where the suit is brought, is allowable under the above rule. *Cushing v. Laird*, 4 *Ben.* 70.

The marshal has no authority to attach the goods and chattels of the defendant unless he fails to find the defendant within his district. *Ib.*

Nor can the credits and effects of the defendant be attached in the hands of garnishees named in the process, unless the marshal failed to find the defendant and also failed to find sufficient goods and chattels of the defendant to be attached. *Ib.*

It is not necessary that the process should contain on its face a citation to the garnishee. *Ib.*

The process of foreign attachment in a court of admiralty, as in a court of common law, is auxiliary and incidental to the principal cause. *Cushing v. Laird*, 107 *U. S.* 69.

Where the marshal's return shows that he made a reasonable effort to serve the defendant before making the attachment, the levy will not be set aside on motion. If the aggrieved party wishes to controvert the return of the marshal, he must be remitted to an action for false return. *Harriman v. Rockaway Beach Pier Co.*, 5 *Fed. R.* 461. (But see *Provost v. Pigeon*, 9 *Fed. R.* 409.)

Ships and other tangible property may be reached by attachment when in the hands of garnishees. *The Alpena*, 7 *Fed. R.* 361.

But an iron pier is not attachable as coming within the designation of goods and chattels. *Harriman v. The Rockaway Beach Pier Co.*, 5 *Fed. R.* 461.

The attachment will be vacated if every reasonable effort is not made by the marshal to personally serve the defendant. *The International Grain Ceiling Co. v. Dill*, 10 *Ben.* 92; *Provost v. Pigeon*, 9 *Fed. R.* 409.

Where the defendant is a married woman, having no place of business or customary resort except her home, which there is no reason to suppose she has left, an omission to seek her there must be held a failure of any proper endeavor to make service. *Provost v. Pigeon*, 9 *Fed. R.* 409.

Where it is clear from undisputed facts that no proper effort has been made to serve the defendant, the return of the marshal will be set aside on motion, although such return alleges that "diligent search and inquiry" were made. *Provost v. Pigeon*, 9 *Fed. R.* 409.

The statutes of the United States, and the rules of the Supreme Court, allow an arrest of the person only in cases in which an arrest is authorized by the laws of the State in which the court may be sitting. *The Carolina*, 14 *Fed. R.* 424.

The act of Mar. 2, 1867 (Rev. Stats. sec. 991, *supra*), makes arrests for debt, whether on mesne process or execution, depend upon the laws for

similar arrests in the States respectively, and applies to proceedings in admiralty. *Louisiana Ins. Co. v. Nickerson*, 2 *Lowell*, 210.

### RULE III.

In all suits in personam, where a simple warrant of arrest issues and is executed, the marshal may take Bail. bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory, or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution Summary execution against principal and may and shall be issued against the principal and sureties. sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

See Admiralty Rule 47, and statutory provisions noted under Admiralty Rule 2.  
Promulgated December Term 1844, 3 How. iii.

### Decisions.

A surety cannot be held for more than the sum named in the stipulation, although it also contain a provision to pay such sum as shall be awarded to the libellant by the final decree. *Brown v. Burrows*, 2 *Blatch*. 340; *The Webb*, 14 *Wall*. 406.

Admiralty rules 2 and 3 give parties the right to a warrant of arrest, and to the advantage of bail to satisfy the final decree rendered in the case. *Marshall v. Bazin*, 7 *N. Y. Leg. Obs.* 342. (But see *La. Ins. Co. v. Nickerson*, 2 *Low*. 310; *The Carolina*, 14 *Fed. R.* 424, and Admiralty Rule 47.)

The principal and his surety on a bond given in proceedings of arrest stand on the same footing, and execution may issue against the surety as well as the principal without notice. *Holmes v. Dodge*, *Abb. Ad.* 60; *Gaines v. Travis*, *Ib.* 422.

A defendant arrested in an admiralty suit is not entitled to discharge from arrest on giving a stipulation for costs, but a stipulation to satisfy the decree must be given. *Gardner v. Isaacson*, *Abb. Ad.* 141. (But see Admiralty Rule 47.)

Where bail has been given, it is not necessary to take out execution against the principal; but if the respondent does not appear and abide by the decree, the libellant may obtain a monition to the bail to appear and show cause why they should not be decreed to satisfy the damage and costs. *In re of Bail Loring Snow*, 2 *Curt. C. C.* 485.

The proper stipulation to be given for the discharge of a party arrested

in a suit in admiralty is for his appearance to abide by the decree, and not for the payment of the sum decreed. *Grace v. Evans*, 3 *Ben.* 470.

It is irregular to arrest a party and at the same time attach his property. *Ib.*

A defendant will not be ordered to give a stipulation to the action under pain of imprisonment, in a case in which he is not liable to arrest. *La. Ins. Co. v. Nickerson*, 2 *Lowell*, 310.

#### RELE IV.

In all suits in personam, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

Promulgated December Term, 1844, 3 How. iv.

## **Decisions.**

A surety can be compelled to pay no more than the sum stated in the stipulation, although the undertaking is conditioned to pay such sum as shall be awarded by the final decree. *Brown v. Burrows*, 2 Blatch. 340.

The principal and surety stand on the same footing, and in case of execution upon a final decree there is no requirement that special notice should be given to the surety. *Holmes v. Dodge*, *Abb. Ad.* 60; *Gaines v. Travis*, *Id.* 422.

There is no rule which requires either party to give the other notice of a final decree, otherwise than by adopting the proper means for enforcing it. *Gaines v. Travis*, *Abb. Ad.* 422.

Sureties cannot be punished as for contempt is not paying a decree in admiralty, neither can they be imprisoned, nor can they be examined concerning their property. The only mode of enforcing a decree is that prescribed by admiralty rule 21. The Blanche Page, 16 *Blatch.* 1.

Stipulators for the release of property attached cannot be heard to say that the court did not acquire jurisdiction by the attachment. *Harriman v. Rockaway Beach Pier Co.*, 8 Fed. R. 94.

**RULE V.**

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

*See Admiralty Rules 6, 35.*

Promulgated December Term, 1844, 3 How. iv; amended May 6, 1872, 13 Wall. xiv.

**Statutory Provisions.**

*Act Aug. 15, 1876, Chap. 304, 19 Stat. L. 206.] Notaries public of the several States, Territories, and the District of Columbia, authorized to take depositions, and do all other acts in relation to the taking of testimony in the courts of the United States, and to take acknowledgments and affidavits, in the same manner and with same effect as commissioners of the circuit court.*

**Decisions.**

Stipulators for a definite amount are only bound to make good the liability of their principal to that amount unless they have been guilty of contumacy or default, in which case they may be held for costs and interest occasioned by their default and contumacy. *The Wanata*, 95 U.S. 600; *Brown v. Burrows*, 2 *Blatch.* 340; *The Webb*, 14 *Wall.* 406,

The surety is not discharged by an amendment of the libel adding a new party libellant, nor by the taking of notes by the libellant as collateral security. *The Maggie Jones*, 1 *Flippin.* 635.

A stipulator, signing the usual stipulation for the release of a vessel, and afterwards paying the amount decreed against the vessel, does not become subrogated to the rights of the libellant, nor does he otherwise acquire a lien upon the vessel. *The Robertson*, 8 *Biss.* 180.

The right of the libellant to require security is one that may be waived, and where a sharp controversy has been carried on for a number of months, and the libellant takes no measures to compel the defendant to give security, he will be held to have waived his privilege. *Pharo v. Smith*, 18 *How. Pr.* 47.

Sureties cannot be punished as for contempt in not paying a decree in admiralty, neither can they be imprisoned, nor can they be examined concerning their property. The only mode of enforcing a decree is that prescribed by admiralty rule 21. *The Blanche Page*, 16 *Blatch.* 1.

A defendant will not be ordered to give a stipulation to the action under pain of imprisonment, in a case in which he is not liable to arrest. *La. Ins. Co. v. Nickerson*, 2 *Lowell*, 310.

The principal and surety stand on the same footing, and in case of execution upon a final decree there is no requirement that special notice

should be given to the surety before issuing execution against him. *Holmes v. Dodge, Abb. Ad. 60; Gaines v. Travis, Id. 422.*

### RULE VI.

In all suits in personam, where bail is taken, the court may,   
 Reduction of bail. upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken Security to be kept as bail, or upon dissolving an attachment of good. property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.

Promulgated December Term, 1844. 8 How. iv.

### Decisions.

The general powers of courts of admiralty, as well as the above rule, authorize the court to require that security once given shall be kept good. *The City of Hartford, 11 Fed. R. 89; The Old Concord, 1 Brown Ad. 270.*

And, by analogy to the above rule, the same power exists in suits in rem, as well as in personam. *The City of Hartford, 11 Fed. R. 89.*

The rule will be also applied to cases of bonds given to the marshal for the release of property under the act of 1847. (Rev. Stats. sec. 941.) *Ib.*

### RULE VII.

In suits in personam, no warrant of arrest, either of the No warrant of arrest person or property of the defendant, shall in certain cases without special order. issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.

Promulgated December Term, 1844, 8 How. iv.

### RULE VIII.

In all suits in rem against a ship, her tackle, sails, apparel, Ship's tackle, etc., in furniture, boats, or other appurtenances, if possession of third person, how obtained. such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same

be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

See Admiralty Rule 38.

Promulgated December Term, 1844, 3 How. iv.

#### Practice.

The above rule not only applies to the articles mentioned, in specie, but extends to the proceeds or sales of those articles. The Geo. Prescott, 1 *Ben.* 1.

#### RULE IX.

In all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

Promulgated December Term, 1844, 3 How. v.

#### Decisions.

In case of a conflict between the marshal executing process in the admiralty, and the sheriff executing the process of a State court, the right of one to hold the property as against the other will be determined by ascertaining which first made the seizure. *Taylor v. Carryl*, 20 *How.* 583; *The Gazelle*, 1 *Sprague*, 378.

Service of regular process in rem is a warning to all parties having any interest in the cause to come in and protect their interest; and unless they do so, if due notice was given, they are bound by the decree. *The Mary*, 9 *Cranck*, 144; *The Commander in Chief*, 1 *Wall.* 52.

The distinguishing and characteristic feature of a suit in admiralty is that the thing or vessel proceeded against itself is seized and impleaded as the defendant, and is judged and sentenced accordingly. *The Moses Taylor*, 4 *Wall.* 411; *The J. W. French*, 13 *Fed. R.* 916.

The officer in whose hands the thing seized is, is the official keeper of the court, and if the thing is taken from him, its redelivery will be enforced by attachment. *The Phebe*, 1 *Ware*, 362.

A court of admiralty will enforce a maritime lien by process in rem against a vessel which has been sold by the sheriff of a State court after

such liens accrued. *The Gazelle*, 1 *Sprague*, 378; *The Julia Ann*, *Id.* 382.

In the execution of admiralty process in rem the officer making the seizure should take and hold actual and manifest possession. *The Hibernia*, 1 *Sprague*, 78.

As long as one court of competent jurisdiction has custody of property, no other court of concurrent jurisdiction can acquire jurisdiction over it. This rule applies to cases of conflict between marshals of different districts as well those arising between the marshal and an officer executing the process of a State court. *The Circassian*, 1 *Ben.* 128.

Where a levy had been made by the marshal pending the custody of the sheriff executing the process of a State court, although such levy by the marshal will not operate to oust the sheriff, it will nevertheless operate as soon as the sheriff is discharged, and will then take precedence of an intervening order of a State court appointing a receiver. *The Roslyn and Midland*, 9 *Ben.* 119.

A vessel cannot be proceeded against in rem to reach an undivided interest of a part owner. *The Manhattan F. I. Co. v. The C. L. Reed*, 1 *Flippin*, 655.

The seizure by the marshal is notice to all persons interested of the pendency of the proceedings; and although the rules and practice of the court require notice by publication they have not the force of statute, and such notice is not necessary in order to enable the court to exercise jurisdiction. The omission to give such notice is only an irregularity. *Dailey v. Doe*, 3 *Fed. R.* 903.

Proceedings in rem against a cargo in the hands of a collector of customs for non-payment of duties may be maintained, and the decree may be executed by a sale of the cargo, subject to the claims of the United States for duties and expenses. 250 Tons of Salt, 5 *Fed. R.* 216.

The mere filing of a libel and issue of process, without seizure of the vessel is not even constructive notice of the pendency of the suit. *The Robert Gaskin*, 9 *Fed. R.* 62.

But it is not necessary in all cases of proceedings in rem that the property itself should be seized. Service may be made by notice and motion. *Snow & Burgess v. 180 $\frac{3}{4}$  Tons of Scrap Iron*, 9 *Fed. R.* 517.

#### RULE X.

In all cases where any goods or other things are arrested, Perishable goods may if the same are perishable, or are liable to be sold, and proceeds brought into court, deterioration, decay or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereto as shall be a full security to satisfy the decree, to be

brought into court to abide the event of the suit ; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement, to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

See Admiralty Rule 26.

Promulgated December Term, 1854, 3 How. v.

#### Decisions.

The district court may order the sale of perishable property after an appeal has been taken to the circuit court and the cause removed there *Jennings v. Carson*, 3 *Cranch*, 2 ; *Jones v. Walker*, 2 *Hayw.* 291.

A vessel under capture as prize of war will not be sold as perishable, at the instance of libellants in a private cause, as capture as prize overrides and supplants all private liens. *Harlan v. The Nassau*, 1 *Blatch. Pr. Cas.* 199.

If a cargo or a ship is liable to deteriorate or perish pending proceedings, the proper course is to apply to the court for an order of sale. *The Nathaniel Hooper*, 3 *Sumner*, 542.

The title of the purchaser of goods ordered to be sold as perishable, will be protected against the libellant and claimant. *Jones v. Walker*, 2 *Hayw.* 291.

#### RULE XI.

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him, upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid ; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of, as it may deem most for the benefit of all concerned.

See Admiralty Rule 26.

Promulgated December Term, 1844, 3 How. v.

**Statutory Provisions.**

*Rev. Stats.* sec. 940.] Proceedings for bailing property by the judge of the court in vacation.

*Rev. Stats.* sec. 941.] Delivery of property seized on giving bond to the marshal approved by the judge or collector of port in double value. Bond to be returned to the court, and judgment against principal and sureties may be rendered at the time of rendering decree in the original cause.

**Decisions.**

After the court has parted with possession of property on bail or stipulation, and it becomes necessary for the purposes of justice to retake it, the process against a person not a party to the stipulation is by monition and not execution in the first instance. *The Gran Para*, 10 *Wheat.* 497.

Whenever a stipulation is taken in an admiralty suit, for property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in its custody. *The Palmyra*, 12 *Wheat.* 1.

The court may, in its discretion, refuse to restore property to a claimant, when there is a dispute as to his right to receive it. *U. S. v. 422 Casks of Wine*, 1 *Peters*, 547.

If a claimant receives a vessel on stipulation to pay into court its appraised value, with interest and costs, he cannot insist on allowances because he has meantime discharged liens. *The Virgin*, 8 *Peters*, 538.

The valuation of property in a stipulation is binding in the appellate court. It is a substitute for the property. *Houseman v. The Cargo of the Schooner North Carolina*, 15 *Peters*, 40<sup>o</sup>.

Stipulators cannot be made liable for more than the amount assumed in their stipulation. *The Ann Caroline*, 2 *Wall.* 538.

And if a decree is rendered against stipulators for a greater amount than the sum for which they were bound, it will be reformed by the Supreme Court so as not to exceed that sum. *The Steamer Webb*, 14 *Wall.* 406.

But if stipulators have been guilty of default or contumacy, they may in addition to their undertaking, be held for costs and interest, in the nature of damages, to the extent that the same have arisen from their breach of duty. *The Wanata*, 95 *U. S.* 600.

The question whether a case is made for the recall of property must be determined before a final decree on the bond is rendered in the district court or the circuit court on appeal. Action on that question cannot be reviewed by the Supreme Court. *U. S. v. Ames*, 99 *U. S.* 35.

A vessel libelled for breach of the navigation laws may be delivered to the claimant on stipulation, pending a decree. *U. S. v. The Pitt*, 2 *Wheel. Cr. Cas.* 602.

It is not a matter of right for either party to have a delivery of property by giving a stipulation for value. *The Nathaniel Hooper*, 3 *Sum.* 542, 562.

A defendant does not waive his right to object to the jurisdiction of the court by filing a stipulation to release his vessel from attachment. *Manchester v. Hotchkiss*, 10 *Am. Law Reg. (N. S.)* 379.

The district court may deliver property on bail by virtue of its general admiralty jurisdiction, and on such security summary judgment may be rendered. *The Alligator*, 1 *Gall.* 145.

The authority of the court to release property from arrest on bail is one of its inherent powers. *Place v. The City of Norwich*, 1 *Ben.* 89.

A stipulator cannot in ordinary cases be discharged from his stipulation by restoring the property; but where the object for which the stipulation was given, namely, the obtaining of possession of the vessel, is frustrated by other process, the court may in a case showing strong equities, order the cancellation of the stipulation. *Livingston v. The Jewess*, 1 *Ben.* 21; *The Empire*, *Id.* 19.

Although a vessel is held in custody to answer for claims amounting to more than her value, she may still be discharged on the claimant giving a stipulation in the full value of the vessel, the same to stand in court for the benefit of all the libellants before the court. *The Antelope*, 1 *Ben.* 521.

Stipulations taken for the purpose of sustaining and rendering effectual the jurisdiction of the court, are to be interpreted, as to the extent and limitation of responsibility created by them, by the intention of the court which required them, and not by the intention of the parties who are bound by them. *Lane v. Townsend*, 1 *Ware*, 286.

The libellant cannot exact additional security when a stipulation is once given. *Gaines v. Travis*, 1 *Abb. Ad.* 297.

When a vessel is released on stipulation, she is also released from the lien of the libellants, and they can have recourse only upon the stipulation. *Carroll v. The T. P. Leathers*, 1 *Newb. Ad.* 432; *The Old Concord*, 1 *Brown Ad.* 270.

A surety on a stipulation who pays the money of his principal is only regarded as an ordinary creditor of the principal, although he is entitled to be subrogated to the rights of the original libellant. *Ib.*

A surety on a stipulation given to release a vessel seized for supplies furnished, and who afterwards pays the decree against the claimant, is not subrogated to the rights of the libellant so as to acquire a lien upon the vessel. *The Robertson*, 8 *Biss.* 180.

A distinction exists between an actual advancement of money to clear off a lien, with a resulting hypothecation of the vessel to the person making such advancement, and the act of joining with the principal debtor in an obligation to pay at a future time upon certain contingencies. *Ib.*

Where several libels are filed against a vessel to recover amounts in the aggregate exceeding her value, she will be released on a stipulation

in the amount of her value without including her freight, if there is no proceeding against the freight. *The Bark Vivid*, 3 *Ben.* 397.

When a vessel is discharged on stipulation, she returns into the hands of her owner subject to all previously existing liens or charges, the same as before her seizure, except that on account of which she was seized. *The Union*, 4 *Blatch.* 90.

When a chartered ship is proceeded against, the court may order her delivery to the general owners, if the charterers who are entitled to possession refuse to claim her. *The Prometheus*, 1 *Low.* 491.

In case of mistake or fraud in entering into the stipulation, and of the improvident discharge of a vessel, she may, on application within a reasonable time, be ordered back into the custody of the marshal. *The Union*, 4 *Blatch.* 90.

But the court has no power to order back into the custody of the marshal a vessel which has been fairly discharged from arrest on stipulation. *The White Squall*, 4 *Blatch.* 103.

And where a redelivery of a vessel is ordered on account of an erroneous discharge, such redelivery will be subject to all existing or subsequently accruing liens, as in ordinary cases, and also to the rights of any bona fide purchaser, in case of her sale intermediate the release and the re-arrest. *The Union*, 4 *Blatch.* 90.

A surety in a stipulation cannot be held for a greater sum than that named in the stipulation, although the stipulation is conditioned to pay such sum as shall be awarded to the libellant by the final decree. *Brown v. Burrows*, 2 *Blatch.* 340.

Part of the obligation which a claimant assumes when he receives property from the custody of the court by substituting personal security, is to maintain his stipulation good in the matter of sureties. *The Virgo*, 13 *Blatch.* 255.

The circuit court on appeal has power to require the claimant to furnish new stipulators when the original stipulators become insolvent. *Ib.*

The absence from the general admiralty rules of the Supreme Court, and from the rules of the district and circuit court, of any provision for the case of insolvent stipulators in actions in rem, furnishes no reason for not requiring new or additional security in such cases. *Ib.*

If the decree is not satisfied, summary judgment and execution may issue against a surviving stipulator, notwithstanding the decease of his co-stipulator, and without requiring the libellant to first exhaust his remedy against the claimant. *The C. F. Ackerman*, 14 *Blatch.* 360.

The amendment of the libel, adding a new party libellant, does not discharge the surety on the stipulation. *The Maggie Jones*, 5 *Cent. L. J.* 263.

Nor is the surety discharged by the taking of collateral security by the libellant. Neither does the same operate to arrest or stay the progress of the suit. *Ib.*

It is no doubt within the power of the court to postpone a decree against the sureties in a stipulation given to procure the release of a

vessel seized under process, until after the time for appeal by the principal has expired, and then to proceed only on notice. *Ex parte Warden*, 2 Sup. Ct. Rep. 383.

Under the provisions of Sec. 941, Rev. Stats. judgment against both principal and sureties may be rendered with the decree in the original cause, and if that is done by the court below the Supreme Court will not disturb its action by mandamus. *Ib.*

A claimant of a vessel, unable to give a bond or stipulation for her release, is not entitled, after a decree dismissing the libel, to have the vessel restored to him within the time allowed for an appeal, nor is such claimant entitled to have a bond for damages arising from the detention of the vessel in case the libellant does appeal. *The Adolph*, 5 Fed. R. 114.

Where two part owners appear as claimants by different proctors, and only one of them gives the stipulation for value, the other claimant who gave no stipulation cannot be held to pay the decree. *The Zodiac*, 5 Fed. R. 220.

The 11th admiralty rule does not imperatively require the court to allow the bonding of a vessel in all cases. It is intended to apply to cases for the recovery of pecuniary demands, and should not be applied to a suit for a forfeiture of the vessel when it would defeat the object of the suit. *The Mary N. Hogan*, 17 Fed. R. 813.

## RULE XII.

In all suits by material men for supplies, or repairs, or other necessaries, the libellant may proceed *Suits by material-men*, against the ship and freight in rem, or against the master or owner alone in personam.

Promulgated December Term, 1844, 3 How. vi; amended December Term, 1858, 21 How. iv; again amended May 6, 1872, 13 Wall. xiv.

### Decisions.

History, amendments, and present operation of this rule discussed at length. *The Circassian*, 11 Blatch. 473.

A lien for supplies is not waived by a material-man who accepts the notes of the owner for the amount due, if it was understood by the parties that the lien was to continue. *The St. Lawrence*, 1 Black, 522.

The Supreme Court has power to alter or amend the above rule so as to give a material-man a lien enforceable in rem or a remedy only in personam, in its discretion. *Ib.*

Liens granted by State laws in favor of material-men for furnishing necessities to a vessel in her home port in such State are valid, though the contract to furnish them is a maritime contract, and can only be enforced in rem in the district courts of the United States. *The Latta-wanna*, 21 Wall. 558.

By the maritime law there is no lien for repairs upon a domestic vessel in her home port, and therefore if any lien is given at all it must be such

as the laws of the State provide. *The Edith*, 94 U. S. 518. (*Note*. The suit in this case was commenced before the amendment of the above rule in 1872.)

A suit in personam against an owner of a vessel for supplies, cannot be maintained in the admiralty where the owner gave a negotiable promissory note for the debt, which has not been given up or tendered at the hearing. *Ramsey v. Allegre*, 12 Wheat. 611.

Workmen, material-men, and persons building a vessel, or furnishing her with repairs or necessaries in a port or State to which she belongs, have no implied lien on the vessel, and cannot enforce one by suit in rem in the admiralty, unless such a lien is given under the provisions of a State law. *Davis v. A New Brig*, *Gilpin*, 473.

Where the State law gives a lien to material-men and others, such lien may be enforced in rem in the admiralty according to its usual forms and practice. *Ib.*

A lien provided by a State law may be enforced before the vessel is finished and sold, and it is not lost by a sale or by a change of the master. *Ib.*

Under the 12th rule in admiralty as amended in May 1872, persons who furnish supplies, repairs, or other necessaries to a ship, with the express or implied consent of the owner or master, have a lien thereon for the value thereof by the general maritime law, which may be enforced in admiralty, whether such ship be domestic or foreign, or whether such supplies, etc., were furnished at her home port or otherwise. *The Augusta*, 5 Am. L. T. Rep. 495.

A carpenter or other person who works upon a ship in building or repairing her, in the employ of a contractor with the owner or master, is so employed with the implied consent of such master or owner, and has a lien thereon for the value of such work, unless he has notice in due time that he must look to such contractor for his pay, and that he shall not have such lien. *Ib.*

There is no distinction in the maritime law between supplies furnished in the home or foreign ports, and in either case a lien arises enforceable in the district court. *Gill v. The Continental*, 8 West. Law Jur. 232.

Contracts for building sea-going ships being maritime in their nature, liens on domestic ships given by a State statute may be enforced in the district courts in admiralty. *The Richard Busteed*, 1 Sprague, 441.

When a vessel is arrested by one lien creditor, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed; but, quære, whether they all can have a remedy on the stipulation given to release the vessel in the main suit. *The Young Mechanic*, 3 Ware, 58.

The last amendment of admiralty rule 12 was intended to place contracts for repairs and supplies for all vessels on an equality as to proceeding in admiralty, not to abrogate the distinction between a domestic contract and a maritime lien. The alteration applies to the character of the process used, not to the question of jurisdiction. *The Selt*, 3 Biss. 344.

A libel can be maintained in the admiralty for supplies or repairs furnished to a domestic vessel at the home port, as the rule now stands. *Ib.*

In the absence of an express contract of waiver, or an agreement that a note shall be taken in actual payment, a maritime lien is not waived or extinguished by giving credit for a limited time, nor by the acceptance of a note for the amount due on account of the service which is the foundation of the lien; but in case a note is taken it is necessary that it should be surrendered at the hearing. The Napoleon, 7 *Biss.* 393.

Although a maritime lien is strictly personal and not assignable, yet if a note taken without waiver of the lien is discounted by a bank upon the indorsement of the person having the lien, and the indorser afterwards takes up the note, he still can enforce the lien, as such a transfer of the note does not extinguish it, and this rule will be applied against an intermediate purchaser of the vessel having knowledge of the lien. *Ib.*

A duly recorded mortgage of a vessel should be paid in preference to a claim for supplies and materials furnished in the home port. The Kate Hinchman, 7 *Biss.* 238.

By the general maritime law of Europe material-men have a lien on a vessel for supplies and repairs. But by the maritime law of this country they have no lien where the repairs are made and the supplies are furnished for a vessel in a port of the State to which she belongs, unless it is allowed by the local law. Davis *v.* Child, 3 *N. Y. Leg. Obs.* 147; S. C., 2 Ware, 78.

Where repairs are made or supplies furnished to a vessel in a port of a State to which she does not belong, she is considered a foreign vessel, and the rule of the general maritime law prevails. *Ib.*

A person who lends money to be employed in repairing a vessel, or to furnish her with supplies, has the same privilege against the vessel that material-men have. He is considered as giving credit both to the ship and to the owners. The ship is hypothecated to him for his security, and he may maintain in the admiralty either a libel in rem against the vessel, or in personam against the owners. *Ib.*

A surety on a stipulation given to release a vessel from custody which has been seized for supplies furnished, is not entitled, by payment of the deeree, to be subrogated to the rights of the libellant so as to acquire a lien on the vessel. The Robertson, 8 *Biss.* 180.

A distinction exists between an actual advancement of money to clear off a lien, with a resulting hypothecation of the ship to the person making such advancement, and the act of joining with the principal debtor in an obligation to pay at a future time upon certain contingencies. *Ib.*

A claim for storage of the sails of a vessel is not the subject of admiralty jurisdiction, and is not included under the term "necessaries" as used in the 12th admiralty rule. Hubbard *v.* Roach, 9 *Biss.* 375.

A suit in the admiralty to enforce a lien given by a State law is not a proceeding under the State law, and therefore the United States is not entitled in such suit to have the res discharged under Rev. Stats. sec.

3753, but must intervene and procure such discharge as an ordinary suitor. The Revenue Cutter, 4 *Saw.* 136.

Where an interest in a vessel is owned by a married woman who is entitled by the law of her domicil to hold property separate from her husband, her husband can libel the vessel for funds and repairs furnished. The D. B. Stedman, 5 *Hughes*, 210.

Where a material-man, having a considerable claim against a vessel on an account running through several months, (some items of which were not maritime,) took cash for part of the amount, and notes at short dates for the residue, and a mortgage on the vessel to secure the notes, the court held that the cash payment must be applied to the extinguishment of the items not maritime, that the notes having been taken at short dates did not waive the lien of the amounts for which they were taken, and that the mortgage being recent and not prejudicial to other maritime liens, and attended by no acts inconsistent with the rights of other maritime creditors, did not waive the lien. *Ib.*

A vessel is liable to a suit in rem for supplies furnished in a foreign port, on the order of the charterer in whose possession she is at the time. The Sydney L. Wright, 5 *Hughes*, 474.

The present rules and decisions of the Supreme Court create no distinction between the liens on a domestic vessel given by the local law, and liens under the general maritime law. The Dan Brown, 9 *Ben.* 309.

Only contracts, liens, etc., of a maritime nature will be enforced in the admiralty. Hence if the State law gives a lien for a cause not maritime, the admiralty will not enforce it. Edwards *v.* Elliott, 21 *Wall.* 532; Young *v.* The Orpheus, 2 *Cliff.* 29, and cases cited; The Pacific, 9 *Fed. R.* 120.

A contract to furnish materials for the construction of a vessel not being maritime in its nature, no lien arises thereon enforceable in the admiralty, although a lien is given by the State law. *Ib.*

By the general admiralty law of Europe a material-man has a lien for supplies whether the vessel was foreign or domestic, and this was also the law in England until a decision in the House of Lords took the lien away in the case of domestic vessels. This decision has been followed by the Supreme Court of the United States, and no lien exists against a domestic vessel for supplies furnished in her home port unless the local law gives such lien. The Raleigh, 2 *Hughes*, 44.

A libel in personam for repairs in which the same person is one of the libellants and also one of the respondents cannot be maintained. The Brothers, 7 *Fed. R.* 878.

Mechanics, laborers and all persons who are employed to repair a vessel or do work upon her are material-men. The City of Salem, 10 *Fed. R.* 843.

A maritime lien will not be enforced as against bona fide purchasers after reasonable opportunity has been afforded and no libel filed. The Bristol, 11 *Fed. R.* 156.

Where a contract for the reconstruction of a vessel was made by the

owner at the home port, but owing to low water the vessel was carried to a foreign port, no lien for the portion of the work done in the latter place arises either under the general maritime law or the local law of the latter place. *The Rapid Transit*, 11 *Fed. R.* 322.

An action in rem is not a bar to a subsequent suit in personam for the same claim, unless the defendants executed a stipulation for the amount of the claim. *Atlantic Mut. Ins. Co. v. Alexandre*, 16 *Fed. R.* 279.

### RULE XIII.

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or <sup>Suits for mariners'</sup> against the ship and freight, or against the <sup>wages.</sup> owner or the master alone in personam.

Promulgated December Term, 1844, 3 How. vi.

#### Statutory Provisions.

*Rev. Stats.* sec. 4251.] No canal boat, without masts or steam power, which is required to be registered, licensed or enrolled and licensed, shall be subject to be libelled in any of the courts of the United States for wages of any person who may be employed on board thereof, or in navigating the same.

*Rev. Stats.* secs. 4524-4548.] Wages and effects of seamen regulated.

*Rev. Stats.* sec. 4546.] Whenever wages of seamen are not paid within ten days, or a dispute arises between the master and seamen concerning the same, the district judge, or, in case he resides more than three miles distant, or is absent, any judge, justice of the peace or commissioner, may summon the master to show cause why process should not issue against the vessel, her tackle, apparel and furniture, according to the course of admiralty courts, to answer for the wages.

*Rev. Stats.* see. 4547.] If the master makes default, sufficient cause shall be certified to the clerk of the district court, who shall issue the usual process. All seamen having cause of complaint may join; and the master may be compelled to produce contracts and log book, otherwise complainants may state contents. But nothing herein contained shall prevent action at common law, or usual remedy in admiralty wherever the vessel may be found, in case she shall have left the port of delivery when her voyage ended before payment of wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

#### Decisions.

The district court has not admiralty jurisdiction of a suit for wages on a voyage on a river above the ebb and flow of the tide. *The Thomas Jefferson*, 10 *Wheat.* 428.

A seaman is restricted from bringing an action for wages against a

vessel in her port of delivery, until ten days after her cargo is discharged, unless she is about to proceed to sea before the expiration of the ten days ; but whether the seaman must wait ten days in case of absolute discharge by the master. *quære.* The Cypress, 1 *Bl. & How.* 83.

Where a seaman ships for a certain time, a discharge by the master, actual or constructive, entitles the seaman to sue for wages at once, though the stipulated time of service has not expired. The Cadmus, 1 *Bl. & How.* 189.

If the master or owner defers beyond a reasonable time to unload the vessel, such laches may be regarded as equivalent to a discharge of the seamen. The Eagle, 1 *Olc.* 282.

Although process is issued under a certificate of sufficient cause conformably to the statute, yet the owner of the vessel may intervene by answer, and bar the action by proving that the libellant had no right to sue. The Warrington, 1 *Bl. & How.* 335.

The act of Congress prescribing the time and manner in which seamen may prosecute suits for wages, has reference only to actions in rem and not to actions in personam. The right of a seaman to sue in personam for his wages, is perfect as soon as the period of his service is completed. Freeman *v.* Baker, 1 *Bl. & How.* 372.

In the admiralty a minor can recover in his own name wages earned in sea service, when the contract on which he serves was made personally with him, and it does not appear that he has any parent or guardian or tutor entitled to receive them. The David Faust, 1 *Ben.* 183.

A suit brought to recover wages before the time allowed by the 6th section of the act of 1790 (Rev. Stats. sec. 4546, *supra*) has elapsed, is prematurely brought, and will be dismissed. *Ib.*

But where a seaman is discharged from a vessel, the discharge terminates the contract, and the provision for ten days delay after the delivery of the cargo is released, and the seaman may proceed at once for his wages. *Ib.*

The fact of a seaman's discharge may be inferred from circumstances, and need not be proved by direct evidence. *Ib.*

The statute which precludes a seaman from having admiralty process against the vessel for his wages until ten days after the discharge of the cargo, does not affect his right to proceed in personam or in rem against the freight. The Commerce, 1 *Sprague*, 34 ; Collins *v.* Nickerson, *Id.* 126 ; The William Jarvis, 1 *Id.* 485 ; The Susan, 3 *Ware*, 222.

A demand of wages and a refusal by the owner to pay until after ten days, does not constitute a dispute within the statute, so as to authorize process in rem before the expiration of the ten days. The Commerce, 1 *Sprague*, 34.

By the statute (Act 1790, ch. 29, sec. 6 ; Rev. Stats. sec. 4546, *supra*) as a general rule, no proceedings can be had against the vessel, until ten days after the right to wages has accrued. But there are three events in which such proceedings may be had within the ten days, viz : (1) If a dispute has arisen ; (2) if the vessel has departed from the port of her discharge ; and (3) if she is about to proceed to sea. In the last two

cases the statute is inoperative, and the right to process is the same as if it had never been passed. The expiration of ten days, and a dispute having arisen, are by the act made equivalent to each other. The William Jarvis, 1 *Sprague*, 485.

Upon the happening of either of the above alternatives, the proceeding by summons to the master is authorized, but not required. It is optional with the seaman whether to resort to the preliminary measure of summoning the master, or to make direct application for admiralty process. *Ib.*

In order that admiralty process may issue within ten days after the arrival of the vessel on the ground that she is about to proceed to sea, it is sufficient to show a reasonable probability that the vessel is about to proceed to sea within the ten days. The Trial, 1 *Bl. & How.* 94.

Under the act of Congress, a seaman cannot sue for his wages until ten days after the discharge of the cargo, unless there is a dispute between the mariner and the master touching the wages. The Eagle, 1 *Olc.* 232.

Where a certificate of cause for admiralty process to recover wages is granted by a commissioner or justice of the peace, the judge may stay the proceedings, or act on the petition *de novo*. *Ib.*

The certificate of cause for admiralty process for the recovery of seamen's wages is not sufficient, if a magistrate or commissioner grants it without stating the residence of the district judge, or that he was absent from his residence. Kief *v.* The St'mbt London, 1 *Newb. Ad.* 6; S. C., 6 *McLean*, 284.

Where several seamen unite in the same proceeding the amount decreed each is to govern in ascertaining the amount involved for the purposes of an appeal. Oliver *v.* Alexander, 6 *Peters*, 143.

The statute only prohibits the issuing of process against the vessel within ten days—not the filing of the libel. Francis *v.* Bassett, 1 *Sprague*, 16.

A claim for seamen's wages and a claim for moneys advanced to the use of the ship may be united in one action, and a seaman claiming for wages and for moneys advanced to the ship's use may join in a libel in rem with a co-libellant claiming wages only. The Merchant, 1 *Abb. Ad.* 1.

Rule 13 in admiralty forbids the blending of a suit for wages against the owner personally with one against the vessel. *Ib.*

A seaman cannot join a cause of action for assault and battery in a suit in rem for wages. (See Admiralty Rule 16.) The Guiding Star, 1 *Fed. R.* 847.

Sections 4546 and 4547 Rev Stats. provide a summary and cumulative remedy to seamen for the recovery of their wages, which may be pursued or waived; but the statute does not deprive them of the right in the first instance to resort to the ordinary admiralty process against the vessel. Murray *v.* The Ferry-boat F. B. Nfmick, 2 *Fed. R.* 86; The Edwin Post, 6 *Fed. R.* 206.

A statute of a foreign country giving masters of vessels of that

country a lien for their wages is enforceable in the admiralty courts of the United States, although by the maritime law the master has no lien. *Covert v. The Brig Wexford*, 3 *Fed. R.* 577.

Although it is discretionary with the admiralty courts of this country to entertain jurisdiction of a claim of foreign seamen against a foreign vessel, jurisdiction cannot be declined where the vessel has been sold under process, and seamen intervene for their interests. *Ib.*

The district court, unless restricted by treaty, may, in the exercise of its discretion, assume jurisdiction of a claim for wages by foreign seamen against a foreign vessel. *The Amalia*, 3 *Fed. R.* 652.

It is not a defense to a suit by a seaman for his wages that the same have been attached by a creditor of the seaman in the hands of the owner of a vessel. *McCarty v. Steam-Propeller City of New Bedford*, 4 *Fed. R.* 818; *Ross v. Bourne*, 14 *Id.* 858.

In the absence of the district judge from his place of residence, a commissioner may assume the jurisdiction conferred by Rev. Stats. sec. 4546. *The Schooner Jefferson Borden*, 6 *Fed. R.* 301.

What facts constitute a discharge of seamen. *Ib.*

Section 4251 of the Rev. Stats., providing that no canal boat shall be libelled for wages, is not abrogated by the act of April 28, 1874 18 Stat. L. 31, providing that the enrollment act of 1793 shall not be construed to extend to canal boats. *The J. S. Woodward*, 6 *Fed. R.* 636.

Persons employed on a fishing boat, are entitled to proceed against the vessel for their wages, although they take no part in the navigation of the boat, and part of their duties are performed on shore. *The Minna*, 11 *Fed. R.* 759. (See note at end of case.)

Special apparatus and appliances on board of a vessel engaged in a particular vocation and which are indispensable to the proper prosecution of such business, are component parts of the tackle, apparel and furniture of such vessel, and liable for seamen's wages and supplies, and the fact that the apparatus is owned by a third party will not exempt the same from seizure and sale. *The Edwin Post*, 11 *Fed. R.* 602.

A libel for seamen's wages will not be necessarily dismissed because prematurely brought, if substantial justice can be done under it. *The L. B. Snow*, 15 *Fed. R.* 282.

A vessel under charter is liable for the wages of seamen hired by the charterers, although the owner may not be liable therefor personally. *The Samuel Ober*, 15 *Fed. R.* 621.

#### RULE XIV.

In all suits for pilotage the libellant may proceed against  
Suits for pilotage. the ship and master, or against the ship, or  
against the owner alone or the master alone in personam.

Promulgated December Term, 1844, 3 How. vi.

**Statutory Provisions.**

*Rev. Stats. sec. 4235.]* States may regulate pilots until further provision is made by congress.

*Rev. Stats. sec. 4236.]* Masters of vessels may employ any pilot licensed by either of two States bounding same port.

*Rev. Stats. sec. 4237.]* States not to make regulations for discriminating rates of pilotage.

*Rev. Stats. sec. 4233, Rule 11.]* Sailing pilot vessels to carry white mast-head light, and exhibit a flare-up light every fifteen minutes.

*Rev. Stats. sec. 4493.]* Pilots liable to damages caused by their misconduct.

*Rev. Stats. sec. 5344.]* Pilots by whose misconduct life is destroyed, how punished.

*Rev. Stats. sec 4438.]* Pilots of steam vessels to be licensed and classified by local boards of inspectors. (See Act Apr. 17, 1874, ch. 107, 18 Stat. L. 30.)

*Rev. Stats. sec. 4442.]* How licenses to pilots of steam vessels to be granted, suspended or revoked.

*Rev. Stats. sec. 4444.]* Restriction of State regulations of pilots of steam vessels.

*Rev. Stats. sec. 4445.]* Oath to be administered to pilots of steam vessels.

*Rev. Stats. sec. 4446.]* License to be exhibited by pilots of steam vessels.

*Rev. Stats. sec. 4401.]* When coastwise seagoing steamers, not registered, to be under control of pilots licensed for steam vessels.

*Rev. Stats. sec. 4406.]* Pilots licensed for steam vessels to answer inquiries, etc., of inspection officer.

*Rev. Stats. sec. 4407.]* Investigation of failure of pilots licensed for steam vessels to perform duty.

*Rev. Stats. sec. 4413.]* Penalty upon pilots of steam vessels for violating rules as to steamers passing.

*Rev. Stats. sec. 4458.]* Fees for licenses to pilots of steam vessels.

**Decisions.**

Claims for pilotage fees are within the jurisdiction of the admiralty. *Ex parte McNeil*, 13 *Wall.* 236; *Hobart v. Drogan*, 10 *Peters*, 108.

The district courts of the United States can properly hear and decide questions of pilotage arising under State laws, and they will not be restrained by prohibition from the Supreme Court. *Ex parte Hager*, 104 *U. S.* 520.

Under a rule providing an alternative remedy against the vessel, or against the owner, a libel is informal if the owner is joined in a proceeding against the vessel. *Dean v. Bates*, 2 *Woodb. & M.* 87, 92.

## RULE XV.

In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone in personam.

Suits for damage by collision. See Admiralty Rule 59.

Promulgated December Term, 1844, 3 How. iv.

## Statutory Provisions.

*Rev. Stats. sec. 4233.]* Regulations for preventing collisions and prescribing lights.

*Rev. Stats. sec. 4234.]* Forfeiture of sailing vessels for omission of lights.

## Decisions.

The jurisdiction of the federal courts in admiralty is concurrent with that of the State courts in suits for damages by collision. *Schoonmaker v. Gilmore*, 102 U. S. 118, and cases cited.

Under the present practice, a libel in rem against the vessel, and personally against her master, may properly be joined. And if the libellant may have originally proceeded against the vessel, master, owner and pilot, the libel may be amended so as to apply to the vessel and master only. *Newell v. Norton*, 3 Wall. 259.

The question of liability for a collision occurring in a foreign port will be determined by the law of the place where it occurred, and in case of doubt as to such law resort will be had to the decisions of the courts of that country. *Smith v. Condry*, 1 How. 28.

The courts of the United States sitting in admiralty have jurisdiction of collisions happening on the high seas, and in the waters of the United States within the ebb and flow of tide, although *infra corpus comitatus*. *Waring v. Clarke*, 5 How. 441.

Where a loss by collision arises from the negligence of the master and crew, the master is personally responsible, but the ship is primarily, although not exclusively, liable. *Hale v. Wash. Ins. Co.*, 2 Story, 176.

Under the 15th admiralty rule, the libellant may proceed, (1) against the ship and master; or (2) against the ship alone; or (3) against the owner alone. But a proceeding in rem against the ship and in personam against the owner cannot be maintained. *The Atlantic and Ogdensburg*, 1 Newb. Ad. 139; S. C., 5 McLean, 622.

In a case of collision, a respondent may recoup his own damages in order to diminish or extinguish the libellant's claim, although no cross-libel be filed; but the respondent should appropriately allege his injuries and pray for relief. *The Reuben Dowd*, 9 Biss. 458.

The cargo laden on board a vessel at the time of collision is in no case liable to be sued for the damage. *The Victor*, 1 Lush. Ad. 72.

An insurer may maintain a suit for collision before paying the insurance money, if it was the bona fide intention of the owner to abandon and hold the insurer liable. *The Manistee*, 7 Biss. 35.

When a collision occurs between a steamer and a sailing vessel, the steamer is held in fault unless she can show that she was prevented from performing her duty to keep out of the way by some fault on the part of the sailing vessel. *Farr v. The British Steamship Farnly*, 1 *Fed. R.* 631.

An amendment will not be allowed whereby a suit in rem for a collision will be turned into one in personam. *The Zodiac*, 5 *Fed. R.* 220.

A libel by a father to recover for the loss of the services of his minor son killed in a collision, will be sustained in admiralty, although such an action would not lie at common law or by the civil law. *The Garland*, 5 *Fed. R.* 924.

And where a statute of a State confers upon an administrator authority to sue for a loss of life caused by the wrongful act, neglect, or default of another, if such loss of life is occasioned by a collision upon navigable waters, the administrator may proceed in rem against the offending vessel. *Ib.*

A proceeding in rem cannot be joined in the same libel with a proceeding in personam, in a suit for damage by collision, under admiralty rule 15. *The Clatsop Chief*, 8 *Fed. R.* 163; S. C., 7 *Sav. 274.*

The admiralty courts of the United States have jurisdiction of collisions occurring on the high seas between foreign vessels. *The Belgenland*, 9 *Fed. R.* 576.

A mortgagee of a vessel sunk by collision is entitled, for the protection of his mortgage interest, to come in on petition as co-libellant in a suit by the owners against the offending vessel. *The Grand Republic*, 10 *Fed. R.* 398.

The right to enforce by proceedings in rem a claim for damages by collision may be lost by delay where the rights of a bona fide purchaser have intervened. *The Bristol*, 11 *Fed. R.* 156.

## RULE XVI.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and marine jurisdiction, the suit shall be in personam only. Suits for assault and battery.

Promulgated December Term, 1844, 3 How. vi.

### Statutory Provisions.

*Rev. Stats. sec. 4596.] Seamen punished for assault upon master or mate.*

*Rev. Stats. sec. 5346.] Assault with dangerous weapon upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty jurisdiction, punished.*

### Decisions.

The owners of a ship are liable for all the torts of the master, when they involve a breach of the passenger contract, and are done while acting within the scope of his employment. But only the actual, and not

punitive, damages can be recovered where the owner is innocent of any participation in the tort. *McGuire v. The Golden Gate*, 1 *McAll.* 104.

Where a tort is a continued act and not separable, and a portion is committed on land and the remainder on the high seas, the jurisdiction of it attaches to the common-law courts. But if the tortious act originates in port, and is not a perfected wrong until the vessel leaves port, it is a continuous act and travels with the tort-feasor and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty. *The Yankee*, 1 *McAll.* 467.

In a libel for a marine tort, the libellant must set forth in a distinct allegation each separate and distinct wrong on which he intends to rely. *Pettingill v. Dinsmore*, 2 *Ware*, 212; S. C., 2 *N. Y. Leg. Obs.* 119.

If the libellant intends to rely on general ill treatment and oppression on the part of the master in aggravation of damages, it must be propounded in a distinct allegation, to enable the master to take issue upon it in his answer. *Ib.*

Where a master is prosecuted in the admiralty for punishing a seaman, he may be permitted, in justification or mitigation of damages, to show that the seaman was habitually careless, disobedient, or negligent in his conduct, but the same must be set forth in his answer. *Ib.*

A claim for assault and battery cannot be joined with one for wages in a suit in rem against the vessel. *The Guiding Star*, 1 *Fed. R.* 347.

## RULE XVII.

In all suits against the ship or freight, founded upon a  
Suits founded on maritime hypothecations. mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies of repairs or other necessaries for the voyage, without any claim or marine interest, the libellant may proceed either in rem, or against the master or the owner alone in personam.

Promulgated December Term, 1844, 3 *How. vi.*

### Decisions.

A libel is informal under this rule if it proceed against both vessel and the owners. *Dean v. Bates*, 2 *Woodb. & M.* 87.

Drafts on the owner of a vessel do not bind her, unless the debt for which they were given by her master is a lien on her, although they express on their face that they are "recoverable against the vessel, freight and cargo." *The Woodland*, 104 *U. S.* 189.

A person signing a stipulation to release a vessel seized in a foreign port for supplies does not, by paying a decree subsequently rendered, acquire a lien on the vessel. *The Robertson*, 8 *Biss.* 180.

Advances of money in the home port of a vessel, even though for

necessaries, do not give the advancers a lien as against other attaching creditors. *The E. A. Barnard*, 2 *Fed. R.* 712.

The master of a vessel can neither sell nor hypothecate the cargo, except in case of urgent necessity; and he can only lawfully do what is directly or indirectly for its benefit considering the situation in which it has been placed by the accidents of the voyage. *The Julia Blake*, 107 *U. S.* 418.

### RULE XVIII.

In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property <sup>Suits on bottomry bonds.</sup> hypotheccated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrong-doer.

Promulgated December Term, 1844, 3 How. vii.

### Decisions.

A libel is informal under this rule if it proceeds against both vessel and owners. *Dean v. Bates*, 2 *Woodb. & M.* 87.

A suit cannot be maintained in the admiralty to enforce the surrender or avoidance of a mortgage of a ship, on the ground that it has not been duly prosecuted, or the claim under it not seasonably made. This is a subject of chancery jurisdiction. *Ib.*

A bottomry bond executed in a foreign country, between subjects of a foreign country, will be enforced in the admiralty courts of the United States, where the ship is within their jurisdiction. *The Jerusalem*, 2 *Gall.* 190; *The Packet*, 3 *Mason*, 255.

The assignee of a bottomry bond may maintain a suit in the admiralty either in his own name or in the name of his assignor. *Burk v. The Brig M. P. Rich*, 1 *Cliff.* 308.

To support a bottomry bond, evidence of actual necessity for repairs and supplies is required, and, if the fact of such necessity be left unproved, evidence is required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent. *The Grapeshot*, 9 *Wall.* 129.

It is essential to a bottomry bond that payment of the sum secured be conditioned on the safe arrival of the vessel. *The Bark Edward*, 10 *Ben.* 668.

A master cannot pledge his vessel by giving a bottomry bond for repairs when the owners of the vessel are present at the place where the

repairs are made, or when he has funds of the owners for the purpose. *Patton v. The Randolph*, 1 *Gilp.* 457.

A suit on a bottomry bond must be by proceedings in rem against the property hypothecated, or the proceeds, except in the cases excepted by admiralty rule 18; and a libel in rem may be a proceeding against the property by arrest or by attachment. *Snow & Burgess v. Scrap Iron*, 11 *Fed. R.* 517.

### RULE XIX.

In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed.

Promulgated December Term, 1844, 3 *How.* vii.

#### Statutory Provisions.

*Rev. Stats.* sec. 4535.] Seamen cannot abandon claims for salvage.

#### Decisions.

Where the depositary of saved property has rendered himself liable for the lien of salvors, he may be proceeded against in admiralty, although not within the terms of this rule. *Gates v. Johnson*, 11 *Monthly Law Rep. N. S.* 279.

In order to sustain an appeal to the Supreme Court in a salvage case, the appellant must show that his individual interest is of an amount sufficient to confer jurisdiction. *Spear v. Place*, 11 *How.* 522.

The true principle in all cases of salvage is adequate reward according to the circumstances of the case. No reason, therefore, can be assigned for fixing an uniform rule for saving derelict property at "not more than half or less than a third of the property saved." *Post v. Jones*, 19 *How.* 150.

Where there was a contract for raising a sunken vessel upon certain stipulations, the party who raised the vessel cannot abandon it, and obtain salvage in a court of admiralty. *Bondies v. Sherwood*, 22 *How.* 214.

The court declines to decide whether in suits for salvage, the suit may be in rem and in personam jointly. The question is still an open one. *Ib.*

A court of admiralty will not order a salvage suit to be set aside or to be stayed because there is pending in a court of law an action of replevin for the salved property, brought by the owner against the salvor, and in which the salvor's lien upon the property may be determined. *A Raft of Spars*, 1 *Abb. Ad.* 291.

No claim for salvage can be made by the crew of a vessel upon the ground that by their services she is brought through a storm into port sound in hull. *Miller v. Kelly*, 1 *Abb. Ad.* 564.

An action for compensation for salvage services rendered to a vessel cannot be maintained in personam against the master, unless it was performed for his benefit. *Ib.*

A court of admiralty has jurisdiction to carry into effect the decree of another admiralty court awarding salvage. *The Centurion*, 1 *Ware*, 477.

A lien exists for salvage services upon the property saved, and possession is not necessary to give it validity. *Eads v. The H. D. Bacon*, 1 *Newb. Ad.* 274.

An intention to abandon a lien for salvage, and a resort to the owners for payment, will not be inferred except from the most unequivocal acts on the part of the salvors. *Ib.*

Admiralty courts have never put the compensation for salvage services upon the basis of pay for work and labor; but a liberal compensation is always allowed in proportion to the benefit received by the owners. *Ib.*

A corporation organized for the purpose of employing vessels to be used in saving wrecked vessels and their cargos, is entitled to recover salvage, even though the persons employed by it are to have no share in it. *The Comanche*, 8 *Wall.* 448.

A suit for salvage cannot be abated on the objection of claimants that others as well as the libellants are entitled to share in the compensation. The remedy of such others is to become parties to the suit, or to make a claim against the proceeds, if any, in the registry of the court. *Ib.*

The defense that the services for which salvage is claimed were rendered under an agreement for a fixed sum payable in any event, is waived, unless set up in the answer, with an averment of payment or tender. *Ib.*

Nothing short of a contract for a fixed sum payable at all events, whether successful or unsuccessful, will bar a meritorious claim for salvage. *Ib.*

A salvage service is none the less so because it is rendered under a contract which regulates the mode of ascertaining the compensation to be paid, but makes the payment of any compensation contingent upon substantial success. *Ib.*

Decrees in salvage cases will not be disturbed as to their amount, unless for a clear mistake, or gross over allowance by the court below. *Ib.*

A libel may be filed for salvage in the name of the master and owners of the salving vessel, although the master may make no claim in his own behalf, but, on the contrary, may disclaim. *The Blackwall*, 10 *Wall.* 1.

A tug towing, under the direction of the fire department of a city, fire engines commonly used on land, into a harbor where a vessel is on fire, and laying alongside of the burning vessel while the engines throw water upon her, is entitled to salvage, the fire being successfully extinguished. And the owners of the tug will not be deprived of salvage because the representatives of the fire department have not made a claim for salvage. *Ib.*

A vessel owned by a corporation may be entitled to salvage, the vessel being otherwise a salvor. *Ib.*

Non-prosecution of their claims by one set of salvors enures to the benefit of the owners of the vessel, and not to that of other salvors who do prosecute their claims. *Ib.*

Personal property of the United States on board of a vessel for transportation from one point to another, is liable to a lien for salvage services rendered in saving the property. Such lien cannot be enforced by the courts in a suit against the United States, nor by a proceeding in rem when the possession of the property can only be had by taking it out of the actual possession of the officers or agents of the government. But it may be enforced by a proceeding in rem where the process of the court can be enforced without disturbing the possession of the government, which, being thus compelled to appear in court to assert its claim, must discharge the lien before the property will be delivered to it. *The Davis*, 10 *Wall.* 15.

Salvors cannot in the same libel proceed in rem against a vessel and in personam against the consignees of her cargo. The true construction of the 19th admiralty rule forbids the joinder of a suit in rem with a suit in personam. *The Sabine*, 101 *U. S.* 384.

Salvage should be regarded in the light of compensation and reward, not in the light of prize. *Murphy v. The Ship Suliole*, 5 *Fed. R.* 99.

Where the owners of a salving vessel sue in their own behalf, without joining the master and crew, who are entitled to share in the compensation, the proper practice is to determine the entire amount, and apportion it between the vessel, master and crew, and to have the share of the master and crew paid into the registry to await their application therefor. *The Leipsic*, 5 *Fed. R.* 108.

Courts of admiralty have jurisdiction of an action to compel distribution by one co-salvor, who has obtained the entire salvage compensation, among the other co-salvors entitled. *McConnochie v. Kerr*, 9 *Fed. R.* 50.

Attachments in rem to enforce a lien for salvage may be sustained in admiralty against the property of a foreign government, if it be not at the time of seizure in the public service, or in the possession of any officer of the government, but in the hands of a private bailee. *Long v. The Tampico*, 16 *Fed. R.* 491.

## RULE XX.

In all petitory and possessory suits between part owners or Petitory and possessory adverse proprietors, or by the owners of a suits between part owners, etc. ship, or the majority thereof, against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

Promulgated December Term, 1844, 2 How. vii.

**Decisions.**

Proceedings by the purchaser of a ship at marshal's sale to obtain possession, should be by arrest of the ship and admonition to the adverse party to appear and make answer. *Blanchard v. The Cavalier*, 38 *Hunt's Mer. Mag.* 325.

A part owner may sustain a petitory suit against a merely fraudulent possessor, without joining the other part owners. *The Friendship*, 2 *Curt. C. C.* 426.

Material-men cannot interfere in a petitory or possessory suit and enforce a lien which they may have upon the vessel. *The Taranto*, 1 *Sprague*, 170.

An attachment of the vessel at common law is no obstacle to a decree in a petitory or possessory suit. *Ib.*

A court of admiralty has no authority to decree the possession of a ship to her general owners on their libel alleging that the charterers have failed to fulfill the contract on their part, the charter being one which gave possession and control of the ship to the charterers for a time certain, with no condition of forfeiture on a breach. *The Prometheus*, 1 *Lowell*, 491.

The fact that the master claims a lien on the vessel furnishes no ground for his refusal to deliver the vessel to her owners, and if he does refuse the court may order such delivery. *Muir v. The Brig Brisk*, 4 *Ben.* 252.

In case of a dispute between part owners of a steamboat as to her employment, a court of admiralty will not decree a sale of the whole boat at the instance of the minority interest. *Lewis v. Kinney*, 5 *Dill.* 159.

Nature of the stipulation which the majority interest, wishing to employ the boat, may be required to give for the protection of the minority interest, discussed. *Ib.*

The courts of the States have concurrent jurisdiction with the courts of the United States over suits for the possession of ships, even where the title of one of the parties was derived under a marshal's deed. *Daily v. Doe*, 3 *Fed. R.* 903.

Though a bond or stipulation with sureties, obtained by libel in the admiralty from the other part owners, is necessary to secure to the dissenting part-owner the preservation of his interest in the vessel unimpaired, it is not essential to his exemption from personal liability where he has disclaimed all interest in the voyage by express notice of dissent, and has never ratified or adopted it as his own. *Scull v. Raymond*, 18 *Fed. R.* 547.

The process under the above rule must be in rem and in personam. *The S. C. Ives*, 1 *Newb. Ad.* 205.

**RULE XXI.**

In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in <sup>Enforcement of decrees</sup> <sub>for payment of money.</sub> the nature of a fieri facias, commanding the

marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.

See Admiralty Rules 41, 47.

Promulgated December Term, 1844, 3 How. vii; amended December Term, 1861, 1 Black, 6.

#### Statutory Provisions.

*Rev. Stats.* sec. 966.] Interest allowed on judgments in circuit and district courts at rate allowed by law of State where court is located.

*Rev. Stats.* sec. 967.] Judgments in circuit and district courts cease to be liens on real estate and chattels in same manner and at like periods as in courts of State where located.

*Rev. Stats.* sec. 985.] Executions to run into all the districts of a State

*Rev. Stats.* sec. 986.] Executions in favor of United States to run in every State and Territory.

*Rev. Stats.* sec. 987.] Execution stayed in circuit court on conditions.

*Rev. Stats.* sec. 988.] When judgment debtor entitled to a continuance of one term.

*Rev. Stats.* sec. 990.] Imprisonment for debt abolished where same abolished by laws of State, and all modifications, conditions and restrictions adopted.

*Rev. Stats.* sec. 991.] Discharge from arrest or imprisonment on mesne or final process according to law of State.

*Rev. Stats.* sec. 992.] Privileges of jail limits same as by laws of State.

*Rev. Stats.* sec. 993.] Goods taken on fieri facias, how appraised.

*Rev. Stats.* sec. 994.] Death of Marshal after levy or after sale.

*Rev. Stats.* sec. 995.] Moneys paid into court, where and how deposited.

*Rev. Stats.* sec. 996.] How moneys deposited to be withdrawn.

#### Decisions.

The real estate of a surety is subject to an execution in the admiralty. *The Kentucky*, 4 Blatch. 448.

Since the adoption of admiralty rule 48 (now 47) there has been no imprisonment for debt in the admiralty where the law of the State has abolished it; but independently of that rule, the same result is effected by the acts of 1839 and 1841 (*Rev. Stats.* sec. 990). *Ib.*

No execution can issue until the entry of a formal decree awarding a recovery to the libellant. *Harris v. Wheeler*, 8 Blatch. 81.

Execution issues against stipulators summarily upon decree rendered against their principals; and no notice is required of a decree other than by taking steps to enforce it. *Gaines v. Travis*, 1 Abb. Ad. 422.

A decree cannot be enforced by sequestration, the only mode being that prescribed by admiralty rule 21. *The Blanche Page*, 16 Blatch. 1.

Stipulators for a definite amount are only bound to make good the liability of their principal to that amount, unless they have been guilty of default and contumacy, when they may be held for costs and interest occasioned by such default. *The Wanata*, 95 U. S. 600, and cases cited.

Goods in the possession of a collector of customs and detained for the payment of duties, may be sold subject to the rights and claims of the government for such duties and expenses. *250 Tons of Salt*, 5 Fed. R. 216.

Admiralty rule 21 does not authorize a personal execution against the claimants in a suit in rem except against such as have signed the stipulation given to release the vessel. *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. R. 279.

## RULE XXII.

All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

Promulgated December Term, 1844, 3 How. viii.

## Decisions.

This rule, in connection with admiralty rules 26, 30, 34, and 36, and the practice thereunder, discussed and construed. *U. S. v. 25 Barrels of Alcohol*, 10 Int. Rev. Rec. 17.

If the offense charged is an act done with intent to do a thing unlawful or prohibited, the intent and knowledge are substantive parts of the offense, and must be averred in a libel of information in the admiralty. *The Schooner Hoppet v. The U. S.*, 7 Cranch, 389.

If the seizure be voluntarily abandoned and the property restored before the libel or information be filed and allowed, the district court has no jurisdiction. *The Brig Ann*, 9 Cranch, 289.

The same technical nicety is not required in a libel or information for a forfeiture, as in indictments at common law. It is sufficient if the

offense be described in the words of the law, and so set forth that, if the allegations be true, the offense must be within the statute. *The Samuel*, 1 *Wheat.* 9.

The seizing officer is a party to the suit under the government for whom he acted, and is liable for trespass if the suit is dismissed, unless he obtain the certificate of probable cause provided by the statute. *Gelston v. Hoyt*, 3 *Wheat.* 246.

It is usually sufficient to charge an offense in the words of a statute; but great particularity is required when the statute is so general as to describe a whole class of persons, and the legislature intended a subdivision of that class. *The Mary Ann*, 8 *Wheat.* 380.

A libel of information being found insufficient to support a decree, but the evidence tending strongly to prove a violation of the law, the Supreme Court remanded the case, with directions to allow an amendment. *Ib.*

An information is sufficient if it pursues the words of the law, and the charge may be stated in the alternative, if each alternative constitutes an offense which is a cause of forfeiture. *The Emily and The Caroline*, 9 *Wheat.* 381.

If an information in the admiralty clearly set forth an offense within the statute, it is sufficient, although it does not conclude *contra formam statuti*. (But see the rule above.) *The Merino*, 9 *Wheat.* 391.

A count describing an offense in the words of one statute, but alleging it to be an offense against another and different statute, is bad in substance. *Ib.*

If a seizure is made on the high seas, or on waters within the jurisdiction of a foreign State, the district court for the district into which the property is brought has jurisdiction. *Ib.*

The jurisdiction of the district courts over causes of seizure does not attach, unless it is alleged and proved that the property proceeded against was openly and visibly seized prior to the commencement of such proceeding, either within the district where the proceeding is had, or upon the high seas and afterwards brought within the district. An objection to the proceeding based upon these grounds may be made in the circuit court, although not taken in the district court. *The Fideliter*, 1 *Abb. U. S.* 577.

A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offense; but, if informal, it may be amended by leave of the court. *The Caroline*, 7 *Cranch*, 496; *S. C.*, 1 *Brock.* 384.

If the master is joined as a defendant in a suit in rem for a forfeiture, the suit will be discontinued as to him inasmuch as he is entitled to a trial by jury. *U. S. v. The Queen*, 11 *Blatch.* 416.

Matters of defense need not be alleged in the libel. *The Aurora v. The U. S.*, 7 *Cranch*, 382; *The Margaret*, 9 *Wheat.* 421.

In suits in admiralty for penalties enforceable in rem for violation of the navigation laws, the jurisdiction depends upon the fact and place of seizure, and these must be averred in the libel. *U. S. v. One Raft of Timber*, 13 *Fed. R.* 796.

## RULE XXIII.

All libels in instance causes, civil or maritime, shall state the nature of the cause ; as, for example, that it is <sup>Form of libels in in-</sup> cause, civil and maritime, of contract, or of <sup>stance causes.</sup> tort or damage, or of salvage, or of possession or otherwise, as the case may be ; and, if the libel be in rem, that the property is within the district ; and, if in personam, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article ; and it shall conclude with a prayer of due process to enforce his rights, in rem or in personam (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all <sup>Defendant may be re-</sup> interrogatories propounded by him touching <sup>quired to answer inter-</sup> rogatories. all and singular the allegations in the libel at the close or conclusion thereof.

See Admiralty Rules 32, 33.

Promulgated December Term, 1844, 3 How. viii.

**Decisions.**

The libel should always by suitable averments show the jurisdiction of the court. *Boon v. The Hornet*, *Crabbe*, 426.

Libels should bring all the parties before the court by inserting their names, and should propound the subject matter in articles with certainty and precision, and with averments admitting of distinct answers. *The Schooner Boston*, 1 *Sumner*, 329.

In causes of damage, the libel should state each distinct act of injury in a distinct article with reasonable certainty of time and place. *Treadwell v. Joseph*, 1 *Sumner*, 390.

A libel is informal if it proceed against both the vessel and the owners. *Dean v. Bates*, 2 *Woodb. & M.* 87.

Every libel for a tort must contain on its face sufficient averments as to place, to show that it is within the admiralty jurisdiction ; otherwise it must be dismissed. *Thomas v. Lane*, 2 *Sumner*, 1.

It is not necessary to state matters of defense in a libel. *The Aurora v. U. S.*, 7 *Cranch*, 382; *The Margaret*, 9 *Wheat.* 421.

It is especially important in collision cases that the pleadings should set out clearly and distinctly, though briefly, the facts relied on ; and the court has power, at any stage of the proceedings, to require the par-

ties to supply defects in the pleadings, although counsel can make such corrections only by exceptions filed. *The Havre*, 1 *Ben.* 295.

Though the owner of a boat and cargo lost by collision has received payment of a part of his loss, he may still maintain a libel, and it is not fatal to his suit that the libel states it to be in behalf of the underwriter. *Fritz v. Bull*, 12 *How.* 466.

There are no technical rules of variance or departure in pleadings in admiralty. *De Nemours v. Vance*, 19 *How.* 162.

The rule is well established that a consignee may sue in a court of admiralty, either in his own name as agent, or in the name of his principal. *McKinlay v. Morrish*, 21 *How.* 343.

An insurer to whom the assured has abandoned the property insured and who has paid the loss, becomes entitled to the rights of the assured and can maintain a suit in his own name. *Mut. Safety Ins. Co. v. The Cargo of the Ship George*, 1 *Olcott*, 89.

An indorsee of a bill of lading may sue in his own name in the admiralty. *The Schooner Mary Ann Guest*, 1 *Olcott*, 498.

The agent of absent owners may libel in his own name, as agent, or in the names of his principals. *Houseman v. The Cargo of the Schooner North Carolina*, 15 *Peters*, 40.

A suit in rem for a marine tort may be prosecuted in any district where the offending thing is found. *The Propeller Commerce*, 1 *Black*, 574.

The general course of admiralty procedure in this country requires a sworn libel as a foundation for process of arrest or attachment. *Martin v. Walker*, 1 *Abb. Ad.* 579.

An omission to state some facts in the libel, which prove to be material but cannot have occasioned any surprise, will not be allowed to work injury to the libellant on appeal, if the court consider the omission as undesigned. *The Quickstep*, 9 *Wall*, 665.

A libel for collision must state the facts constituting the alleged fault. To allege that the offending vessel "was so carelessly, negligently, unskillfully and recklessly navigated that," etc., is not sufficient. *The H. P. Baldwin*, 2 *Abb. U. S.* 257. See also *McWilliams v. The Steam Tug Vim*, 2 *Fed. R.* 874.

The rules of pleading in admiralty do not require all the technical precision which is required at common law, but they require that the cause of action should be clearly set forth, so that a plain and direct issue may be made. *Jenks v. Lewis*, 1 *Ware*, 51.

In a libel for a marine tort the libellant must set forth in a distinct allegation each separate and distinct wrong on which he intends to rely, and for which he claims damages. *Pettingill v. Dinsmore*, 2 *Ware*, 212; *S. C.*, 2 *N. Y. Leg. Obs.* 119.

In suits in rem all persons having claims of a like nature against the thing, may join in a single libel for the purpose of having that question decided, whether the claims arise from tort or contract. *The Young Mechanic*, 3 *Ware*, 58.

When two libels are filed where one only is required, costs in one only will be allowed. The R. P. Chase, 3 *Ware*, 294.

An action for a joint tort against two or more persons, cannot be united with an action for a tort against one separately. *Roberts v. Skolfield*, 3 *Ware*, 184.

A libel sufficient under the general maritime law is sufficient in cases arising upon the lakes. The Illinois, 1 *Brown Ad.* 497.

It is unnecessary to aver that the vessel in question is engaged in navigation, or capable of being so employed. *Ib.*

It is every day's practice to allow suits in the admiralty to be brought in the name of the assignee of a chose in action. *Cobb v. Howard*, 3 *Blatch.* 524.

Where a supplemental libel is filed before return of process, it becomes part of the pleadings without further notice to the respondent, and he is bound to answer it. *Thomas v. Gray*, 1 *Bl. & How.* 493.

A libel filed by the owners of a cargo damaged by collision must contain averments showing unequivocally and with reasonable certainty that the libellants had such a general or special right of property in the cargo, that by its loss or injury they have suffered damage. *Minturn v. Alexandre*, 5 *Fed. R.* 117.

#### RULE XXIV.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matter of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

Promulgated December Term, 1844, 3 *How.* viii.

#### Statutory Provisions.

*Rev. Stats.* sec. 948.] Circuit and district courts may at any time allow amendments of process, in their discretion, and upon terms.

*Rev. Stats.* sec. 954.] General power of courts of the United States to allow amendments.

#### Decisions.

An amendment by inserting a new substantive defense will be disallowed where the statute of limitations has run against it. *The Schooner Harmony*, 1 *Gall.* 124.

The circuit court in cases of appeal is very cautious in admitting new matters of defense or allegation to be introduced, where the facts on which they rest are not new, or newly discovered, but were known at or before the hearing in the district court. *Coffin v. Jenkins*, 3 *Story*, 108.

An amendment may be made in the circuit court so as to make a claim for damages caused by a vexatious appeal. *Weaver v. Thompson*, 1 *Wall. C. C.* 343.

If a sentence of forfeiture be reversed for a defective libel, the cause will be remanded to the circuit court, with directions to allow an amendment. *The Brig Carolina v. U. S.*, 7 *Cranch*, 496.

A libel defective for want of substantial averments may be amended after reversal of the cause on appeal. *The Schooner Anne v. U. S.*, 7 *Cranch*, 570.

When merits plainly appear, it is the settled practice of the Supreme Court, in admiralty, to allow a new allegation to be filed, and for this purpose to remand the cause to the circuit court. *The Adeline*, 9 *Cranch*, 244; *The Mary Ann*, 8 *Wheat.* 380.

The circuit court may, upon appeal, allow, by way of amendment, the introduction of a new allegation into an information in admiralty. *The Edward*, 1 *Wheat.* 261; *The Mariana Flora*, 11 *Wheat.* 1.

A cause in admiralty will be remanded to the circuit court for an amendment of the pleadings, unless they contain at least some general allegation of the necessary facts to enable the court to proceed. *The Divina Pastora*, 4 *Wheat.* 52.

An amendment in an appellate court cannot introduce a new subject of litigation. *Houseman v. The Cargo of the Schooner North Carolina*, 15 *Peters*, 40; *The John Jay*, 3 *Blatch.* 67.

The Supreme Court will not allow an amendment by the insertion of a claim for interest so as to make the matter in dispute sufficient to support the jurisdiction. *Udall v. The Ohio*, 17 *How.* 17.

If a libel improperly joins a proceeding in rem with one in personam, an amendment may be allowed. *Newell v. Norton*, 3 *Wall.* 257.

If a cause be brought on the prize side of the court, a condemnation for a forfeiture cannot be given on the instance side; but the record may be remanded for an amendment. *U. S. v. Weed*, 5 *Wall.* 62; *The Watchful*, 6 *Wall.* 91.

A libel may be amended on motion by striking out unnecessary and impertinent allegations. *Am. Ins. Co. v. Johnson*, 1 *Bl. & How.* 1.

Where the claimant files exceptions to the libel, the libellant may move to amend without submitting to the exceptions. *The Western Metropolis*, 28 *How. Pr.* 283.

The name of a party who has lost his interest in the suit may be stricken out by amendment. *The Falcon*, 4 *Blatch.* 367.

An amendment will not be permitted in a collision case, whereby the suit will be turning from a proceeding in rem into one in personam. *The Zodiac*, 5 *Fed. R.* 220.

Amendments are allowed, in the discretion of the court, at any time until the termination of the cause. *The Edwin Post*, 6 *Fed. R.* 206.

Amendments of mere form will not entitle the respondent to costs. *Olson v. the Edwin Post*, 6 *Fed. R.* 314.

An amendment may be allowed, even when the cause is in the hands of a commissioner. *The Reuben Dowd*, 9 *Biss.* 458.

Admiralty and revenue causes are amendable in the circuit court, even in matters of substance. *Warren v. Moody*, 9 *Fed. R.* 673.

A suit upon a maritime contract commenced by a libel in rem cannot be turned into a suit in personam by amendment, without new process in personam or a general appearance by the respondent. *The Monte A.*, 12 *Fed. R.* 331.

A case on appeal proceeds de novo in the circuit court, and the court may permit amendments to the pleadings. *The Morning Star*, 14 *Fed. R.* 866.

### RULE XXV.

In all cases of libels in personam, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

Defendant may be required to give stipulation for costs and expenses in suits in personam.

See Admiralty Rule 35.

Promulgated December Term 1844, 3 *How. ix.*

### Decisions.

The practice of the English admiralty, and the former practice in the district court for the Southern District of New York, in respect to security in suits in personam, reviewed in connection with the effect of the adoption of the above rule. *Gardner v. Isaacson*, 1 *Abb. Ad.* 141.

The court will not require the defendant to give a stipulation to the action under pain of imprisonment, in a case in which he is not liable to arrest. *La. Ins. Co. v. Nickerson*, 2 *Lou.* 310.

Security for costs will be required in actions in personam of all parties prosecuting or defending the suit. *Rawson v. Lyon*, 15 *Fed. R.* 831.

### RULE XXVI.

In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation, Claimant to verify his claim. stating that the claimant by whom or on whose behalf the claim is made is the true and bona-fide owner, and that no other person is owner thereof. And where the

When claim is made by agent, master or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation for costs, a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.

See Admiralty Rules 10, 11, 34, 35.

Promulgated December Term, 1844, 3 How. ix.

#### Decisions.

After a claim has been admitted, the libellant must file an exceptive allegation, in order to put in issue the claimant's right to appear. U. S. v. 422 Casks of Wine, 1 Peters, 547.

Nature of the claimant's formal claim, and what it should contain, discussed. The Adeline, 9 Cranch, 244.

An appearance and claim waives objections to irregularity of the process to compel appearance. The Merino, 9 Wheat. 391.

The court will not, upon a summary application of a claimant, inquire into damages caused by an unfounded arrest of his ship. The libellant has a right at any stage of the cause to discontinue the same, and the only penalty to which he can be subjected is the payment of costs. The Brig Oriole, 1 Olcott, 67.

Where the attorney in fact of an owner appears as claimant in the absence of the owner, the owner may afterwards, on coming into the jurisdiction, be allowed to make claim and defend in his own name. The Bark Lawrens, 1 Abb. Ad. 302.

The above rule in connection with admiralty rules 22, 30, 34 and 36, and the practice thereunder discussed and construed. U. S. v. 25 Barrels of Alcohol, 10 Int. Rev. Rec. 17.

A court of admiralty may order a ship libelled to be delivered to the general owners, if the charterers who are entitled to possession refuse to claim her. The Prometheus, 1 Low. 491.

A motion to strike the claim and answer from the files, on the ground that it appeared on the hearing that the claimant had no interest in the property at the time the answer was filed, will not be entertained. The Prindiville, 1 Brown Ad. 485.

If the claim is not put in issue, and the libellant goes to a hearing upon the merits without objection, it is an admission that the claimant is rightly in court. Ib.

A party will not be permitted to amend his claim by setting forth that at the time the cause of action arose he was the true and bona-fide

owner, and had agreed with the present owner to discharge all liens against her. *Ib.*

The right of a party to appear and defend a suit in rem must be put in contestation, if at all, before the hearing, and then only by way of exception, if the disability appear on the face of the claim, or an exceptive allegation putting the right in issue, if it does not so appear. *Ib.*

The owner of the property should make the claim and answer if possible. But the court may permit this to be done by a representative. *Matter of Stover, 1 Curt. C. C. 201.*

Claims in prize causes should be made by the parties themselves, if within the jurisdiction, and not by mere agents, inasmuch as the captors have a right to the answers of the claimants on oath. *The Schooner Lively, 1 Gall. 314.*

Objection to the right of a claimant to intervene in an admiralty cause must be taken by preliminary exception to his competency. The objection will not be heard after the cause is at issue and brought to a hearing. *Thomas v. The Steamboat Kosciusco, 11 N. Y. Leg. Obs. 38.*

A consul may make claim in behalf of subjects of his country in prize causes. *The London Packet, 1 Mas. 14.* (See also the *Ship Adolph, 1 Curt. C. C. 87.*)

A person becoming interested in the subject of the litigation during its pendency may be permitted to come in and protect his interest, if application is made within a reasonable time. *The Jenny Lind, 4 Blatch. 513.*

No one can intervene and defend a suit in rem unless it appears by the answer and claim that he has a lien or proprietary interest in the vessel seized. *The R. W. Skillinger, 1 Flippin, 436.*

A "claimant" under the above rule is one who assumes the position of a defendant, and demands a redelivery to himself of the property seized. This is different from an "intervenor" under admiralty rule 34, the latter being one who seeks only the protection of his interest in the property, or the payment of his claim, in the ultimate disposition of the case. *The Two Marys, 12 Fed. R. 152.*

A person may have his election to appear as a claimant or merely as an intervenor; but having made claim and given bond for the libellant's demand, he has not a right, as a matter of course, afterwards to change his position to that of an intervenor merely. *Ib.*

The owner of property seized in a suit in rem is not recognized until he comes in, makes claim, and defends. *The J. W. French, 13 Fed. R. 916.*

#### RULE XXVII.

In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer verification and form of of the defendant to the allegations in the answer. libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article.

and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

See Admiralty Rule 48.

Promulgated December Term, 1844, 3 How. ix.

#### Decisions.

The answer should meet each material allegation of the libel with an admission, a denial, or a defense. *The Schooner Boston*, 1 *Sumner*, 328.

When a defense is put in by way of justification, it must admit the facts. *Treadwell v. Joseph*, 1 *Sumner*, 390.

The answer of the respondent on oath in reply to interrogatories does not constitute positive evidence in his own favor. Its true effect is either to furnish evidence for the other party, or, in a case doubtful in point of proof, to turn the scale in favor of the respondent. *Cushman v. Ryan*, 1 *Story*, 91.

The answer should be verified by oath. *Gamwell v. Skinner*, 2 *Gall. 45.*

There are no technical rules of variance or departure in pleading in the admiralty. *Dupont de Nemours v. Vance*, 19 *How.* 162.

Answers to special interrogatories are considered as analogous to the decisory oath of the civil law, and no more evidence for one party than the other, and will not be conclusive for either, where the weight of the other proof in the case preponderates against the fact sworn to, or when, by self-contradiction, suspicion attaches to the fidelity of the answers. *The L. W. Goldsmith*, 1 *Newb. Ad.* 123.

The rule prevailing in the chancery courts, that the answer of the defendant, when responsive to the bill, is equal to two disinterested witnesses, or to one witness with other circumstances of equivalent force, does not prevail in the admiralty courts. *Eads v. The H. D. Bacon*, 1 *Newb. Ad.* 274.

Nor does the same rule prevail even when the answer is responsive to interrogatories propounded. *Ib.*

Where a master of a vessel is sued in the admiralty for punishing a seaman, if he intends to rely upon proof that the seaman was habitually careless, disobedient, or negligent in his conduct, such matter must be set up in the answer. *Pettingill v. Dinsmore*, 2 *Ware*, 212.

If the defendant wishes to recoup damages against the libellant, such damages must be alleged in his answer and be accompanied with an appropriate prayer for relief. *The Reuben Doud*, 9 *Biss.* 458.

It would seem that an allegation in an answer that the respondent is "ignorant" of the matter alleged in the libel, is sufficient. *The City of Salem*, 10 *Fed. R.* 843.

New matter in an answer constituting a defensive allegation should be articedled and pleaded separately, and not blended with the response to any article of the libel. *The Whistler*, 13 *Fed. R.* 295.

**RULE XXVIII.**

The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; <sup>Exceptions to answers.</sup> and, if the court should adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

See Admiralty Rule 36.

Promulgated December Term, 1844, 3 How. ix.

**Decisions.**

Exceptions to a pleading in the admiralty have the effect of a demurrer, and also of a motion to make the pleading more definite and certain. *The Transport*, 1 *Ben. 86.*

Formal objections cannot be entertained at the hearing. *Furness v. Magown*, *Olc. 55.*

**RULE XXIX.**

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or Default in making another day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, Setting aside default, and, upon the application of the defendant, on payment of costs. admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

See Admiralty Rule 40.

Promulgated December Term, 1844, 3 How. x.

**Decisions.**

Upon a motion to vacate an order pro confesso, and for leave to answer, the respondent must satisfactorily account for laches, and exhibit by answer or affidavit a meritorious defense. *Scott v. The Young America*, 1 *Newb. Ad. 107.*

If the defendant refuses to answer any interrogatory propounded by order of the court, the charge in the libel to which the interrogatory relates will be taken pro confesso. *The David Pratt*, 1 *Ware*, 495.

If it appears that the defendant has neglected to put in an answer through ignorance of the practice of the court, and is at the time of the hearing absent, the court is not precluded from receiving any evidence which his counsel may offer as *amicus curiae*. *Ib.*

A default in a revenue case establishes the fact alleged in the information, and justifies a decree of condemnation. *Miller v. U. S.*, 11 *Wall.* 268.

### RULE XXX.

In all cases where the defendant answers, but does not When further answer fully and explicitly and distinctly to may be compelled. all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

Promulgated December Term, 1844, 3 How. x.

### RULE XXXI.

The defendant may object, by his answer, to answer any Defendant need not an- allegation or interrogatory contained in swer matter which will the libel which will expose him to any criminate him, etc. prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offense.

Promulgated December Term, 1844, 3 How. x.

### Statutory Provisions.

*Rev. Stats., sec. 860.]* Pleadings, discovery or evidence in judicial proceedings not to be used in criminal proceedings, except prosecutions for perjury.

### Decisions.

The above rule is to be interpreted as carrying into effect the fifth amendment of the Constitution, and the corresponding rule of law forbidding the compulsory disclosure of liability to a pecuniary forfeiture or penalty. *Pollock v. The Laura*, 5 *Fed. R.* 133.

Since the passage of the act of Feb. 25, 1868 (*Rev. Stats., sec. 860*), preventing evidence in judicial proceedings from being used in criminal prosecutions, the privilege of the witness of not being compelled to answer incriminating questions will no longer be upheld. *U. S. v. McCarthy*, 18 *Fed. R.* 87.

### RULE XXXII.

The defendant shall have the right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory pro confesso in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

See Admiralty Rule 23, 33.

Promulgated December Term, 1844, 3 How. x.

### Decisions.

Each party has a right to require the personal answer of the other, under oath, to any interrogatories touching the matter in issue. The David Pratt, 1 *Ware*, 495; Gammell *v.* Skinner, 2 *Gall.* 45.

Answers to special interrogatories are considered as analogous to the decisory oath of the civil law, and no more evidence for one party than the other, and will not be conclusive for either, when the weight of the other proof in the case preponderates against the fact sworn to, or when, by self contradiction, suspicion attaches to the fidelity of the answers. The L. B. Goldsmith, 1 *Newb. Ad.* 123.

### RULE XXXIII.

Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

See Admiralty Rules 23, 32.

Promulgated December Term, 1844, 3 How. xi.

## RULE XXXIV.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

See Admiralty Rules 26, 25.

Promulgated December Term, 1844, 3 How. xi.

## Decisions.

This rule, together with admiralty rules 22, 26, 30 and 36, construed and applied. *U. S. v. 25 Barrels of Alcohol*, 10 *Int. Rev. Rec.* 17.

A mortgagee of a ship may come in and defend his interest in the ship sued, but can rely only on defenses open to the owner of the ship. *The Chieftain*, *Brown. & Lush.* 104.

An insurer of a ship may intervene and defend (on terms), if he shows a substantial interest which may be prejudiced by the plaintiff proceeding to judgment. *The Regina del Mare*, *Brown & Lush.* 315.

An underwriter, who has accepted an abandonment which divests the original claimant of all interest, may be admitted to intervene and become the dominus litis in a suit in rem. *The Brig Ann C. Pratt*, 2 *Curt. C. C.* 340.

But underwriters to whom an abandonment is made, but which has not been accepted, will not be permitted to defend. *The Ship Packet*, 3 *Mas.* 255; *The Schooner Boston*, 1 *Sumner*, 328; *The Ship Henry Ewbank*, 1 *Sumner*, 400.

A creditor who has attached the thing in suit against the owner before seizure, may intervene in a proceeding for a forfeiture. *The Mary Ann*, 1 *Ware*, 104.

A mortgagee of a vessel has a right to intervene in an admiralty suit for the protection of his interest. *The Old Concord*, 1 *Brown Ad.* 270.

Material-men cannot intervene in a petitory or possessory suit, to enforce a lien which they may have on the vessel. *The Taranto*, 1 *Sprague*, 170.

An "intervenor," under this rule, is one who, without demanding the redelivery of the property seized, seeks only the protection of his interest in it, or the payment of his claim in the ultimate disposition of the case. *The Two Marys*, 12 *Fed. R.* 152; *S. C.*, 16 *Fed. R.* 697.

### RULE XXXV.

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or mari- All stipulations to be given time proceeding, shall be given and taken according to rule fifth. in the manner prescribed by rule fifth as amended.

See Admiralty Rules 5, 6.

Promulgated December Term, 1844, 3 *How. xi*; amended May 6, 1872, 14 *Wall. xi*.

### RULE XXXVI.

Exceptions may be taken to any libel, allegation or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found. Exceptions to form.

See Admiralty Rule 28.

Promulgated December Term, 1844, 3 *How. xi*.

### Decisions.

This rule, together with admiralty rules 22, 26 and 30, construed and applied. *U. S. v. 25 Barrels of Alcohol*, 10 *Int. Rev. Rec.* 17.

Exceptions will be held to have been waived on appeal if not found or noted on the record. *The Vaughan and Telegraph*, 14 *Wall.* 258.

Formal objections to the suit cannot be taken on the final hearing. *Furness v. The Brig Magoun*, *Olc.* 55.

The nature and office of exceptions defined. *The California*, 1 *Saw.* 463.

Exceptions cannot be taken after joining issue upon the libel, and filing a cross libel. *The Fifeshire*, 11 *Fed. R.* 748.

Exceptions for insufficiency and impertinence are taken for entirely different causes, and therefore should not be taken to the same matter either conjunctively or disjunctively. *The Whistler*, 13 *Fed. R.* 295.

### RULE XXXVII.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching Garnishee to answer interrogatories; refusal.

the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any Effects in his hands to debts, or credits, or effects, the same shall be held subject to event of suit. be held in his hands, liable to answer the exigency of the suit.

See Admiralty Rule 2.

Promulgated December Term, 1844, 3 How. xi.

#### Decisions.

On default of one summoned as garnishee, the libellant is not entitled, under the above rule, to have execution in personam against him. The compulsory process provided for by the rule is only to compel an answer. *McDonald v. Rennel*, 11 *Law. Rep. N. S.* 157.

It is the right and duty of the garnishee to put in an answer, and the libellant has not a right to contest it. *Shorey v. Rennel*, 1 *Sprague*, 418.

If the garnishee makes default, execution does not, in the first instance, go against him personally, or his property, but only against the debts, effects or credits of the principal in his hands, and upon such default the libellant may have compulsory process to compel an answer. *Ib.*

If the libellant does not need a disclosure from the garnishee, but can satisfy the court by affidavits that the garnishee has debts, effects, or credits in his hands, the libellant may have execution against them, without an answer having been put in. *Ib.*

Practice in cases of garnishment discussed. *Ib.*; *Smith v. Miln*, 1 *Abb. Ad.* 373; *Cushing v. Laird*, 4 *Ben.* 70; *The Oliver A. Carrigan*, 7 *Fed. R.* 507.

The answer of the garnishee is not conclusive as between two attaching creditors. *Dent v. Radman*, 1 *Fed. R.* 882.

Where persons summoned as garnishees are adjudged by the court to have a fund of the principal defendant in their hands, they cannot appeal until there is an award of execution against them, and then they must appeal from the last decree only. *Cushing v. Laird*, 107 *U. S.* 69.

#### RULE XXXVIII.

In cases of mariners' wages, or bottomry, or salvage, or the In suits in rem, freight, other proceedings in rem, where freight or etc., attached may be brought into court. other proceeds of property are attached to or bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order

the same to be brought into court to answer the exigency of the suit, and, upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.

See Admiralty Rule S.

Promulgated December Term, 1844, 3 How. xii.

#### **Decisions.**

Seamen have a paramount lien on the freight earned by the voyage for the payment of their wages, and this lien will be enforced as against the sheriff who has previously attached the freight under process issued from the State court. *The Sailor Prince and her Freight*, 1 *Ben.* 284.

It is not a good defense to a petition that freight may be brought into the admiralty court to answer the exigency of suits for mariner's wages and materials which are a charge on the freight, that the consignee before the libels were filed, was summoned as trustee or garnishee of the ship-owner in a court of common law. *The Caroline*, 1 *Low.* 173.

Freighters have not, under ordinary circumstances, a right to give bail for freight which they acknowledge to be due, but should pay the same into court. *The Freight Money of the Monadnock*, 5 *Ben.* 357.

Money to secure contribution in general average, deposited to obtain the release of cargo, may be brought into court under the above rule in a suit for salvage. *The Queen of the Pacific*, 18 *Fed. R.* 700.

#### **RULE XXXIX.**

If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

Promulgated December Term, 1844, 3 How. xii.

#### **Practice.**

Where, under the rules of the court, the defendant has an equal right with the libellant to move the trial of a cause, delay on behalf of the libellant in bringing it to hearing will not authorize the dismissal of the libel. *The Mariel*, 6 *Fed. R.* 831.

#### **RULE XL.**

The court may, in its discretion, upon the motion of the defendant and the payment of costs, res- cind the decree in any suit in which, on account of his contumacy and default, the matter of the libel

Default of defendant may be opened on terms at any time within ten days.

shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

See Admiralty Rule 29.

<sup>1</sup> Promulgated December Term, 1844, 3 How xii.

#### Decisions

Although a default be irregularly taken against a defendant and an order of reference obtained thereon, the subsequent appearance of the defendant before the commissioner, without objection to the proceedings and taking adjournments, will be held a waiver of the irregularity. *Gaines v. Travis*, 1 Abb. Ad. 297.

Upon a motion to vacate an order pro confesso, and for leave to answer, the respondent must satisfactorily account for his laches, and exhibit by answer or affidavit a meritorious defense. *Scott v. The Propeller Young America*, 1 Newb. Ad. 107; *Northrup v. Gregory*, 2 Abb. U. S. 503.

A motion to open a decree entered by default must be made within ten days after entry; otherwise it must be denied. *Northrup v. Gregory*, 2 Abb. U. S. 503.

It seems that a court of admiralty has no general power, at least after the expiration of the term, to set aside a final decree on the ground of oversight, inadvertence or mistake. *The Illinois*, 1 Brown Ad. 13.

The ten days allowed by admiralty rule 40 for setting aside a decree, are restrictive, and a motion made after this time cannot be entertained. *Ib.*

A summary rehearing on motion can be granted only during the term at which the decree was made. *Snow v. Edwards*, 2 Low. 273.

In cases of default, the summary jurisdiction to rehear is limited to ten days irrespective of terms of court. *Ib.*

After the term has passed in ordinary cases, and after ten days in defaulted cases, the court can entertain a libel of review. *Ib.*

#### RULE XLI.

All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

See Admiralty Rules 1, 21, and statutes and decisions noted thereunder.  
Promulgated December Term, 1844, 3 How. xii.

**Decisions.**

If, after a sale by the marshal, the purchaser obtains possession of the property without paying the price, the court will enforce by summary process either a redelivery of the property in specie, or the payment of the purchase money. *The Phebe*, 1 *Ware*, 362.

A vessel sold under a final decree in a proceeding in rem is sold free and clear of all incumbrances upon the vessel. All liens or incumbrances upon the vessel are by such sale transferred from the vessel to the proceeds, and if the purchaser holds a mortgage against the vessel, his claim may also be allowed out of the proceeds. *In Re Surplus and Remnants of the Steamboats Syracuse, McDonald and Ohio*, 9 *Ben.* 348.

It is the duty of the marshal to bring the proceeds of sale into court, with an account. *The Avery and Cargo*, 2 *Gall.* 308.

And if the sale be made on credit, in pursuance of the decree, and security be taken, the papers executed as security may be required to be brought into court. *Walls v. Thornton's Adm'r*, 2 *Brock.* 422.

Goods in the hands of a collector of customs to secure the payment of duties may be sold by the marshal at the suit of a private creditor, subject, however, to the payment of duties and expenses due the government. 250 Tons of Salt, 5 *Fed. R.* 216.

To invalidate the sale of a vessel on the ground of fraud, it must appear that the proceedings were both collusive and fraudulent, and that the purchaser was cognizant of the fraud. *The Garland*, 16 *Fed. R.* 283.

**RULE XLII.**

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks, signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.

See Admiralty Rule 43.

Promulgated December Term, 1844, 3 *How.* xiii.

Moneys to be deposited in bank, to be withdrawn on joint order of judge and clerk.

Clerk to keep a book containing account of checks, etc.

**Decisions.**

Where moneys belonging to the registry of the court are withdrawn from it without authority of law, the court can, by summary proceedings, compel their restitution; and any one entitled to the moneys may apply to the court by petition for a delivery of them to him. *Osborn v. U. S.*, 91 *U. S.* 474.

In disposing of a fund in its registry, it is competent for a court of admiralty to require proof of the right of a claimant to any part of the same. *Dent v. Radmann*, 1 *Fed. R.* 882.

### RULE XLIII.

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene pro interessu suo for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

*See Admiralty Rule 42.*

Promulgated December Term, 1844 3, How. xiii.

### Decisions.

When a vessel is arrested by a lieu creditor, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed. *The Young Mechanic*, 3 *Ware*, 58.

Money in the registry of a court attached in a suit in personam may be applied to the satisfaction of any decree obtained in such suit. *Boyd v. Urquhart*, 1 *Sprague*, 423.

The court will not, on the application of a creditor, appropriate a sum of money in court decreed to be paid to the libellant, to the satisfaction of a debt due such creditor from the libellant. *Brackett v. The Hercules*, *Gilp.* 184.

An administrator appointed in another State, who has not taken out letters within the jurisdiction of the court, may intervene in behalf of his intestate, in a suit in rem against a vessel which was the property of the intestate at his death. *The Boston*, 1 *Bl. & H.* 309.

The right to proceed against surplus proceeds holds good where a party has the right to sue in personam, though not in rem, on the ground that the court has jurisdiction of the parties, and that the subject or fund is already under its control. *The Stephen Allen*, 1 *Bl. & H.* 175.

The district court in admiralty has the right to exercise equity powers in the distribution of a surplus arising from a sale under decree to parties entitled to such surplus, whether by federal or state law; and it is immaterial whether such parties have maritime liens. The reason is, because there is a fund in court which cannot be taken out except by the court's order, and parties having rights in the vessel can only exercise them by coming into court. *The Skylark*, 5 *Biss.* 251.

Libels or petitions against a vessel are heard in any order in which they are brought up. Until all libels and petitions are heard, the proceeds are not distributed except to those having an undoubted priority, such as seamen and salvors ; and this not without notice to all others. *The Fanny*, 2 *Low.* 508.

One who obtains the first decree has no priority over others whose liens are in themselves of equal degree with his. *Ib.*

But in case of a collision, where one of two parties injured institutes proceedings against the vessel in fault, and at his own expense prosecutes his suit to condemnation of the vessel, or of the proceeds of her sale in the registry, another party injured by the same collision, who has contributed nothing to the litigation to establish the vessel's liability, but has stood by during that contest, and taken no part in it, cannot share in the proceeds of the sale of the vessel, until the claim of the first party is satisfied in full. *Woodworth v. Insurance Co.*, 5 *Wall.* 87.

Under the above rule, the party entitled to remnants or surplus in court, can only obtain it by petition or motion, and any one having an interest has a right to intervene pro interessu suo, whether his application involves the settlement of partnership accounts or not. *The L. B. Goldsmith*, 1 *Newb. Ad.* 123.

A lien created by state law may be satisfied from proceeds in the registry. *The Mary Zephyr*, 6 *Saw.* 427.

Any person having a specific lien on, or vested right in, a surplus fund in court, may apply by petition for the protection of his interest under the 43d admiralty rule. *The Lottawanna*, 21 *Wall.* 558.

† The district court can marshal the fund in its registry only between lienholders and owners. *The Edith*, 94 *U. S.* 518.

Where a libel is not filed until after the report classifying claims is made, it should be postponed until after all other claims are paid. *The City of Tawas*, 3 *Fed. R.* 170.

Rules for the marshalling and payment of claims stated. *Ib.*

Where the owner and mortgagee of a ship both appear and file answers, it is competent for each to claim in his answer, or by separate petition, that the proceeds, after the payment of the libellant's claim, be paid to him. *The Ship Panama*, 16 *Olc.* 343.

#### RULE XLIV.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to ad-

Reference to commissioners.

Powers of commissioners on reference.

minister oaths to and to examine the parties and witnesses touching the premises.

Promulgated December Term, 1844, 3 How. xiii.

#### Decisions.

If damages are assessed in gross by commissioners, without any specification of items, the decree will be reversed, although the report of the commissioners was not excepted to in the court below. *Murray v. The Charming Betsy*, 2 *Cranch*, 64.

It is not necessary to take exceptions to the report of the commissioner, if the errors appear upon the face of the report. *Himely v. Rose*, 5 *Cranch*, 813.

The report of a commissioner can be reviewed in the Supreme Court only in so far as specific objections appear by the record to have been taken to it in the court below. *The Ship Potomac*, 2 *Black*, 581.

Parties excepting to the report of a commissioner should state with reasonable precision the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is. Ex gr. If the exception be that the commissioner received "improper and immaterial evidence," the exception should show what the evidence was. If, that "he had no evidence to justify his report," it should be set forth what evidence he did have. If, that "he admitted the evidence of witnesses who were not competent," it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected. *The Commander in Chief*, 1 *Wall*. 48.

The report of the commissioner has not the effect of a verdict. The court may not concur in his conclusions upon the facts reported, and may modify or wholly reject it. *Sturgis v. Clough*, 1 *Wall*. 269.

Objections to the amount of damages as reported by a commissioner and awarded by the court, will not be entertained in the Supreme Court, where it appears that neither party excepted to the report of the commissioner. *The Vanderbilt*, 6 *Wall*. 225.

An objection to the regularity of a commissioner's report cannot be brought forward by exception to the report, but should be raised by motion founded on the irregularity. *The Columbus*, 1 *Abb. Ad.* 37.

An exception to a commissioner's report draws in question only the reasons upon which the report is founded. *Ib.*

The legality or propriety of an order of reference cannot be impeached upon exception to the report. *The Rhode Island*, 1 *Abb. Ad.* 100.

Where upon reference to a commissioner, there is a conflict of testimony upon a question of fact, the court will adopt the conclusion of the commissioner, unless there is a palpable preponderance of evidence against it. *Holmes v. Dodge*, 1 *Abb. Ad.* 60.

The commissioner's report should state facts and conclusions, and not detail the evidence at length. The Trial, 1 *Bl. & H.* 94.

The practice of calling in sea-faring men to assist the judgment of the court, has never been sanctioned in this country. The Waterloo, 1 *Bl. & H.* 114.

The report of a commissioner will not be disturbed, unless it be shown that he is wrong. *Taber v. Jenny*, 1 *Sprague*, 315.

The propriety of the action of a commissioner in refusing to allow a person to be sworn to contradict testimony previously given, cannot be raised by an exception to the report, but must be raised by an application to the court before the report is made. The E. C. Scranton, 4 *Ben.* 127.

Nor can objections to the admission of evidence before a commissioner be raised by exception to his report. The Transit, 4 *Ben.* 138.

Objections taken to the rulings of a commissioner as to the admission of evidence in the course of a reference to ascertain damages, may be brought up for review on exceptions, after the report is made, or, if necessary, may be brought up on a certificate of the commissioner pending the reference. The Brigantine Beaver, 8 *Ben.* 594.

A case mainly involving an accounting may properly be referred to a commissioner. *Shaw v. Collier*, 18 *How. Pr.* 288; S. C., 4 *Blatch.* 370.

#### RULE XLV.

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.

See Sup. Ct. Rules 8, 29, and statutes and decisions noted thereunder. See also Admiralty Rules 49, 50, 52.

Promulgated December Term, 1844, 3 *How. xiii.*

#### Statutory Provisions.

*Rev. Stats.* sec. 631.] Appeals from district court to next term of circuit court allowed in admiralty causes, where matter in dispute exceeds fifty dollars exclusive of costs.

*Rev. Stats.* sec. 632.] Copies of proofs, entries and papers to be certified to appellate court.

*Rev. Stats.* sec. 692.] Appeals in equity and admiralty causes from circuit to Supreme Court, where the matter in dispute exceeds two thousand dollars exclusive of costs. (Note.—By the Act of Feb. 16, 1875, ch. 77, sec. 3, 18 Stat. L. 316, the matter in dispute necessary to a review by the Supreme Court is raised to five thousand dollars, exclusive of costs.)

*Rev. Stats.* sec. 695.] Appeals in prize causes from district to Su-

preme Court, where the matter in dispute exceeds two thousand dollars exclusive of costs, and without reference to matter in dispute on certificate of the district judge. (Note.—By the Act of Feb. 16, 1875, ch. 77, sec. 3, 18 Stat. L. 316, the matter in dispute necessary to a review by the Supreme Court is raised to five thousand dollars, exclusive of costs.)

*Rev. Stats. sec. 701.]* Supreme Court may affirm, modify or reverse decree of circuit court or district court in prize causes, and shall remand the cause to inferior court for execution.

*Rev. Stats. sec. 968.]* If libellant recovers less than three hundred dollars on appeal, exclusive of costs, he shall not be allowed, but may be compelled to pay costs.

*Rev. Stats. sec. 1000.]* Bond to be given on appeal from circuit to Supreme Court.

*Rev. Stats. secs. 1005, 1006.]* Amendments may be allowed by Supreme Court.

*Rev. Stats. sec. 1007.]* Supersedcas to be obtained by serving writ of error within sixty days after judgment, and giving security; and where a supersedeas may be obtained, execution shall not issue within ten days.

*Rev. Stats. sec. 1008.]* Time within which writs of error to be taken from circuit to Supreme Court.

*Rev. Stats. sec. 1009.]* Time within which appeals in prize causes to be taken to Supreme Court.

*Rev. Stats. sec. 1010.]* Damages and costs on affirmance by Supreme Court.

*Rev. Stats. sec. 1011.]* No reversal in Supreme Court, or circuit court, for error in ruling plea in abatement, or for error in fact.

*Rev. Stats. sec 1012.]* Appeals from circuit courts and from district courts acting as circuit courts, to be subject to same rules, regulations, etc., as writs of error.

*Rev. Stats. sec. 1013.]* Where both parties appeal to Supreme Court, one record sufficient.

*Act Feb. 16, 1875, 18 Stat. L. 315.]* Circuit courts to find facts and law separately in admiralty causes.—Jury may try issues of fact by consent of parties.—Review by Supreme Court to be limited to questions of law, and rulings excepted to and presented by bill of exceptions. (See Rev. Stats. sec. 698.)

#### Decisions.

The only mode of reviewing, in the Supreme Court, causes of admiralty and maritime jurisdiction, is by appeal, and the regulations respecting writs of error apply to such appeals. *The San Pedro*, 2 *Wh.* 132.

If a circuit court entertain an appeal from a district court without jurisdiction, the Supreme Court, on appeal, will reverse the decree of the circuit court. *U. S. v. Norse*, 6 *Peters*, 470.

An appeal bond, approved by the court is sufficient, though signed by only part of the appellants. *Brockett v. Brockett*, 2 *How.* 238.

A petition to open a final decree filed and taken into consideration by

the court at the same term in which the decree was made, suspends the decree, so that the time allowed to supersede it by appeal, does not begin to run until the petition is disposed of. *Ib.*

Though a decree has been entered as of a prior date, the rights of the parties in respect to an appeal are determined by the date of the actual entry, or of the signing and filing of the final decree. *Rubber Co. v. Goodyear*, 6 *Wall.* 153.

Where the district court, sitting in admiralty, allowed an appeal from its decree to the next circuit court, although the same was not prayed for in writing in accordance with its rules, the jurisdiction of the circuit court at once attached, notwithstanding the failure of the clerk of the district court to deliver the appeal and record to the clerk of the circuit court within the time required by its rules. *The S. S. Osborne*, 105 *U. S.* 447.

Garnishees can appeal only from a final decree awarding execution against them. *Cushing v. Laid*, 107 *U. S.* 69.

On an appeal to the circuit court from a decree of the district court in admiralty, no citation is necessary, but only a written notice by the proctor to the proctor of the adverse party. *The Ellen*, 4 *Blatch.* 107.

No summary judgment can be entered in the circuit court within ten days after rendering a decree in cases which may be appealed to the Supreme Court. *The New Orleans*, 17 *Blatch.* 216; *The Jesse Williamson*, *Id.* 220.

But if no appeal lies to the Supreme Court, summary judgment may be rendered without waiting for ten days to expire. *The Blanche Page*, 17 *Blatch.* 221.

In the admiralty, an appeal supersedes altogether the decree of the court below, and the case is to be tried in the appellate court as if no decree had been passed in the court from which the appeal is taken. *Steamer Saratoga v. 438 Bales of Cotton*, 1 *Woods*, 75; *The Morning Star*, 14 *Fed. R.* 866.

An appeal in admiralty from the district to the circuit court in effect vacates the decree of the district court, and a new trial in all respects, and a new decree, are to be had in the circuit court. The latter must execute its own decree, and the district court has nothing more to do with the case. *The Lucille*, 19 *Wall.* 73.

An order of the circuit court merely affirming the decree of the district court, and nothing more, is not such a decree as the circuit court should render, and is not a final decree from which an appeal lies to this court. *Ib.*

It is error and ground for reversal for a circuit court to affirm a decree of the district court in admiralty, and at the same time dismiss the appeal. *The Lottawanna*, 20 *Wall.* 201.

Where an appeal is taken to the circuit court from the decree of the district court in a proceeding in rem, the property or its proceeds follows the cause into the former court. *Ib.*

A new trial will be denied in the district court in admiralty causes, when the parties are entitled to a new hearing on the facts in the circuit court. *Mainwaring v. The Bark Carrie Delap*, 1 *Fed. R.* 880.

Admiralty causes arising on the lakes can be reviewed by the Supreme Court only by appeal, although tried by jury. *Boyd v. Clark*, 13 *Fed. R.* 908.

Additional testimony in admiralty causes may be taken on both sides in the circuit court on appeal, and the court may allow amendments to the pleadings. *The Morning Star*, 14 *Fed. R.* 866.

The denial of a motion to quash an execution made by a stipulator against whom execution has issued, is not a final decree from which an appeal will lie. *The Elmira*, 16 *Fed. R.* 133.

Where a party appeals, the appeal opens the whole case. The party cannot be allowed to claim the benefit of the decree below, and, standing secure on that, try his fortunes in the circuit court. *The Hesper*, 18 *Fed. R.* 696.

#### RULE XLVI.

In all cases not provided for by the foregoing rules, the District and circuit district and circuit courts are to regulate practice. The practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

Promulgated December Term, 1844, 3 How. xiii.

#### Statutory Provisions.

*Rev. Stats.*, sec. 918.] The several circuit and district courts may make rules not inconsistent with law, or the rules prescribed by the Supreme Court.

#### Decisions.

Power of the circuit courts to establish rules, discussed and explained. *Beers v. Haughton*, 9 *Peters*, 329; *The City of Hartford*, 11 *Fed. R.* 89; *The Monte A.*, 12 *Fed. R.* 331.

#### RULE XLVII.

(1.) In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be to be taken in accordance with laws of State. taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the State courts.

(2.) And imprisonment for debt, on process issuing out of Imprisonment for debt the admiralty court, is abolished in all cases abolished where same is abolished by State. where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be

hereafter, abolished, upon similar or analogous process issuing from a State court.

See Admiralty Rules 2, 3, 21, and statutes and decisions noted thereunder.  
Originally rule 48, promulgated December Term, 1850, 1 How. v.

#### Decisions.

The acts of Congress adopting statutes of the States refer only to such as are already in existence, and do not apply to future legislation. *In Re Freeman*, 2 *Curt. C. C.* 491; *Campbell v. Hadley*, 1 *Sprague*, 470.

A surety, both under the statute and the above rule, is exempt from liability to imprisonment on execution issued by the district court in admiralty, in all cases where he would be exempt on like process issued from a court of the State in which the district court is held. *The Kentucky*, 4 *Blatch.* 448.

### RULE XLVIII.

(1.) The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the Modification of admiralty rule 27. district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

(2.) All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed Repeal of inconsistent rules.

Originally rule 49, promulgated December Term, 1850, 10 How. vi.

### RULE XLIX.

Further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September 1789,\* upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the

\* Rev. Stats. secs. 861, 863, 864, 865, 866.

court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

See Admiralty Rule 50.

Originally rule 50, Promulgated December Term, 1851, 18 How. vi.

#### Statutory Provisions.

*Rev. Stats. sec. 862.]* The mode of proof in admiralty causes to be according to rules prescribed by Supreme Court.

*Rev. Stats. sec. 917.]* The Supreme Court may make rules for taking and obtaining evidence in admiralty causes.

*Rev. Stats. sec. 863.]* When and how depositions *de bene esse* may be taken.

*Rev. Stats. sec. 864.]* Witness to be sworn and his deposition reduced to writing by himself or magistrate.

*Rev. Stats. sec. 865.]* Transmission of depositions *de bene esse* to the court.

*Rev. Stats. sec. 866.]* Depositions under *a dedimus potestatem, and in perpetuam, etc.*

#### Decisions.

Depositions cannot be used on the trial of a suit in admiralty, which were taken in another suit concerning the same subject-matter, where the party against whom they are offered was not a party to the suit in which they were taken, nor privy to any such party, and had no right to cross-examine the witnesses. *Rutherford v. Geddes*, 4 Wall. 220.

Nor can depositions be read in admiralty, any more than at common law, without some sufficient reason being shown why the witness was not produced at the hearing. *Ib.*

Additional testimony may be taken on both sides in the circuit court, and the court may protect the rights of the parties where amendments are allowed. *The Morning Star*, 14 Fed. R. 866.

#### RULE L.

When oral evidence shall be taken down by the clerk of the Oral evidence taken district court, pursuant to the above-men- down by clerk, how used on appeal. tioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to

take the depositions of the same witnesses, or either of them, if he should so elect.

See Admiralty Rules 49, 51.

Originally rule 51, promulgated December Term, 1851, 13 How. vi.

### RULE LI.

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

See Admiralty Rule 24.

Originally rule 52, promulgated December Term, 1854, 17 How. vi.

### Practice.

The practice before the adoption of the above rule was to require the libellant to reply or otherwise put upon the record, matter supposed to be in avoidance of new matter alleged in the answer. *Gladding v. Constant*, 1 *Sprague*, 73; *Tabor v. Jenny*, *Id.* 315.

### RULE LII.

(1.) The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, so that the same shall contain the following:

- a. The style of the court.
- b. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.
- c. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.
- d. The libel, with exhibits annexed thereto.
- e. The pleadings of the defendant, with the exhibits annexed thereto.

- f. The testimony on the part of the libellant, and any exhibits not annexed to the libel.
- g. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.
- h. Any order of the court to which exception was made.
- i. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.
- j. The final decree.
- k. The prayer for an appeal, and the action of the district court thereon ; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted :

- a. The continuances.
- b. All motions, rules, and orders not excepted to which are merely preparatory for trial.
- c. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to the deposition in the district court was founded on some one or more of these ; in which case, so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to ; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

(2.) The clerk of the district court shall page the copy of Clerk to page, index the record thus made up, and shall make an and certify copy. index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule ; and no other certificate of the record shall be needful or inserted.

(3.) Hereafter, in making up the record to be transmitted

to the circuit court on appeal, the clerk of the district court shall omit therefrom any matter stipulated by proctors of the pleading, testimony or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

As to record to be transmitted on appeal to Supreme Court, see Sup. Ct. Rule 7, par. 6.

Originally rule 53, promulgated December Term, 1854, 17 How. vi; third paragraph added May 2, 1881, 103 U. S. xiii.

#### **Statutory Provisions.**

*Rev. Stats. sec. 698.]* Transcripts on appeals in causes of admiralty and maritime jurisdiction, prescribed.

*Rev. Stats. sec. 750.]* Final record in admiralty causes, what to contain.

*Rev. Stats. sec. 1013.]* Where both parties appeal to the Supreme Court, one record sufficient.

#### **Decisions.**

The record transmitted to the circuit court under the above rule becomes a part of the record of the cause in that court, and if there be an appeal to the Supreme Court, such record must, as a whole, be transmitted to that court, notwithstanding the act of Feb. 16, 1875 (18 Stat. L. 315), requiring the circuit court to make findings of fact, and limiting the review of the Supreme Court to questions of law. The Alice Tainter, 14 *Blatch.* 225.

Notwithstanding the failure of the clerk of the district court to deliver the record into the circuit court within the time required by rule, the jurisdiction of the circuit court, nevertheless, attaches. The S. S. Osborne, 105 U. S. 447.

#### **RULE LIII.**

Whenever a cross-libel is filed upon any counter-claim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

Originally rule 54, promulgated December Term, 1868, 7 Wall. v.

#### **Decisions.**

The answer of the defendants should not, even by stipulation, be regarded as a cross-libel. The respondents should file their cross-libel, take

out process, and have it served in the usual way. *Ward v. Chamberlain*, 21 *How.* 572.

Where there has been a change of interest in the res, since the matters stated in the libel occurred, and the claimant insists that the former owner should be held to answer the libellant's claim, such former owner may file a cross-libel, and the libellants' proceedings will be stayed until security is given. The Geo. H. Parker, 23 *Int. Rev. Rec.* 88.

It is at the election of a defendant to rely upon a set-off by way of recoupment, or to file a cross-libel. But by recoupment, the defendant can only diminish the libellant's claim; whereas by cross-libel he may obtain judgment against the libellant. *Snow v. Carruth*, 1 *Sprague*, 324. See the *Sapphire*, 18 *Wall.* 51.

And if a cross-libel is filed, the court may, in its discretion, stay proceedings in the first suit until an appearance be entered, and other steps taken in the second suit. *Nichols v. Tremlett*, 1 *Sprague*, 361.

The object of the above rule is to compel the appearance and giving of security by a respondent in a cross-libel in personam, in cases where it does not appear proper that he should be relieved from giving such security. Hence, in a cross-libel in rem there must be a seizure within the jurisdiction, upon which the usual security must follow. The Steamer *Bristol*, 4 *Ben.* 55.

The 53d admiralty rule, requiring the respondents in a cross-libel to give security to respond in damages as claimed in the cross-libel, applies as well to actions in rem as to those in personam. The *Toledo*, 1 *Brown Ad.* 445.

A cross-libellant must act with promptness in applying for security. And if he waits until the eve of the trial, when witnesses are summoned, and the case is ready to proceed, the motion will be denied. The Geo. H. Parker, 1 *Flippin*, 606.

Damages by way of recoupment may be awarded to a defendant in order to reduce or extinguish the claim of the libellant, although no cross-libel is filed. But the defendant should allege his injuries in his answer, and appropriately pray for relief. And an amendment may be allowed for this purpose, although the case is in the hands of a commissioner. The *Reuben Dowd*, 9 *Biss.* 458.

A cross-libel for salvage in a suit for collision, does not arise out of the same cause of action, and security cannot be required of the libellant. *Crowell v. The Schooner Theresa Wolf*, 4 *Fed. R.* 152.

A cross-libel cannot be sustained to enforce a new subject-matter introduced into the litigation by strangers to the original suit. The 53d admiralty rule clearly indicates that parties other than the original parties cannot be joined either as libellants or respondents in a cross-libel. *The Ping-On v. Blethen*, 11 *Fed. R.* 607; S. C., 7 *Saw.* 483.

After a cross-libel in personam has been filed in a suit in rem, and issue joined, it is too late for the cross-libellant to object that the original libellant has no admiralty lien. The *Fifeshire*, 11 *Fed. R.* 743.

The words "same cause of action," contained in the above rule, are not limited to the same legal demand, but are used in a more general

sense, meaning the same transaction, dispute or subject-matter which has been the cause of the action being brought, and include those cases of cross-libels where the question in dispute is identical in both, the defense in the one suit being the ground of the claim in the other. *Vianello v. The Credit Lyonnais*, 15 *Fed. R.* 637.

Respondents in a cross-libel will be required to give security where the vessel in the original libel is in custody, as well as where she has been released on bond or stipulation. And the respondents will not be allowed at their own option to submit to a stay of proceedings and at the same time hold the vessel in custody indefinitely under the original libel ; but if the refusal is willful, the court may discharge the vessel upon the claimant's own stipulation, if he be unable to give security to release her. Or the court may order her to be sold. *Empresa Maritima A Vapor v. North & S. A. N. Co.*, 16 *Fed. R.* 502.

#### RULE LIV.

When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the said act above recited,\* the said owner or owners shall and may file a libel or petition in the proper district court of <sup>Petition to be filed by owner claiming exemption.</sup> the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf ; and thereupon said court, having caused due appraisement to be had of the amount or value of <sup>Interest of owner to be appraised and paid into court, or security given.</sup> the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered ; or, if

\* Rev. Stats. secs. 4283, 4284, 4285.

Or trustee may be appointed, and interest transferred to him. the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act,\* and, upon compliance with such order, the said court Monition to issue to shall issue a monition against all persons persons claiming damages; time. claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given Public notice to be as in other cases, and such further notice given. served through the post-office, or otherwise, as the court, in its discretion, may direct; and the Further prosecutions said court shall also, on the application of may be restrained. the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

See Admiralty Rule 58.

Originally rule 55, promulgated May 6, 1872, 13 Wall. xii.

#### Statutory Provisions.

*Rev. Stats. sec. 4282.]* Owners of vessels not liable for losses by fire, unless caused by design or neglect of such owner.

*Rev. Stats. sec. 4283.]* Liability of owner of vessel for loss or destruction of property shipped, or for damages by collision, or other loss or damage without his privity or knowledge, not to exceed his interest.

*Rev. Stats. sec. 4284.]* Persons suffering injury, damage or loss to be paid pro rata, and may take proceedings to apportion same.

*Rev. Stats. sec. 4285.]* Transfer of interest to trustee.

*Rev. Stats. sec. 4286.]* When charterer deemed owner within meaning of above provisions.

*Rev. Stats. sec. 4287.]* Remedies reserved against master, officers and seamen, notwithstanding they may be part-owners.

*Rev. Stats. sec. 4288.]* Inflammable materials not to be shipped, without note in writing describing same;—penalty. But this section not to apply to vessels used on rivers or inland navigation.

*Rev. Stats. sec. 4289.]* Preceding sections not to apply to owners of any canal boat, barge or lighter, or of any vessel used in rivers or inland navigation.

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\* *Rev. Stats. sec. 4285.*

**Decisions.**

The statute limiting the liability of ship-owners, construed in the following cases : *Walker v. Transportation Co.*, 3 *Wall.* 150 ; *The City of Hartford*, 11 *Blatch.* 290 ; *The Whistler*, 2 *Sav.* 348 ; *Norwich Co. v. Wright*, 13 *Wall.* 104 ; *Allen v. McKay*, 1 *Sprague*, 219 ; *The City of Norwich*, 1 *Ben.* 89 ; *Thorp v. Hammond*, 12 *Wall.* 408 ; *Thomassen v. Mark Whitwell*, 9 *Ben.* 403 ; *The Scotland*, 105 *U. S.* 24 ; *The Wanata*, 95 *U. S.* 600 ; *The Benefactor*, 103 *U. S.* 239 ; *Providence & N. Y. S. S. Co. v. Hill Mfg Co.*, 3 *Sup. Ct. R.* 379 ; *In re The Long Island North Shore Passenger & Freight Trans. Co.*, 5 *Fed. R.* 509 ; *The Mamie*, 5 *Fed. R.* 813, affirmed on appeal, 8 *Fed. R.* 367 ; *The Alpena*, 8 *Fed. R.* 280 ; *The Marie, and Elizabeth*, 11 *Fed. R.* 520 ; *S. C.*, 12 *Fed. R.* 627 ; *The Favorite*, 12 *Fed. R.* 213 ; *Thomassen v. Whitwell*, 12 *Fed. R.* 891 ; *In re Leonard*, 14 *Fed. R.* 53 ; *The North Star*, 106 *U. S.* 17 ; *Propeller Niagara v. Cordes*, 21 *How.* 26 ; *Moore v. Transportation Co.*, 21 *How.* 1.

The practice and proper course of proceeding under the act pointed out. *Norwich Co. v. Wright*, 13 *Wall.* 104.

The Supreme Court had the power to make the 55th (now the 54th) rule in admiralty, notwithstanding the statute prohibiting the granting of injunctions to stay proceedings in the State courts. *In re Providence & New York Steamship Co.*, 6 *Ben.* 124.

Proceedings by a ship owner under the act limiting his liability superside all suits brought by persons suffering injury or loss, and this is so without the issuance of an injunction from the court in which such proceedings are instituted. *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 3 *Sup. Ct. R.* 379.

The court reaffirms the authority of Congress to pass the act limiting the liability of shipowners. *Ib.*

The court also reaffirms its own authority to adopt the rules in admiralty prescribing the manner in which proceedings under the act shall be conducted. *Ib.*

A shipowner may take advantage of the proceedings provided for by the third section of the act (Rev. Stats. sec. 4283) and of the admiralty rules on that subject, in cases of suit for loss or damage by fire. *Ib.*

Where actual total loss occurs, there is no need of formal abandonment to entitle the owners to the benefits of the limited liability act. *The Peshtigo*, 2 *Flippin*, 466.

The owners of foreign as well as domestic vessels may claim the benefit of the statute limiting the liability of ship-owners ; and the statute extends to acts done on the high seas as well as in waters of the United States. *The Scotland*, 105 *U. S.* 24. See *Thomassen v. Mark Whitwell*, 9 *Ben.* 403.

Ship-owners may avail themselves of the benefit of the statute limiting their liability by answer or plea, as well as by the form prescribed by the rules, at least so far as to obtain protection against the libellants or plaintiffs in the suit. The rules were not intended to restrict them, but to aid them in bringing into concourse those having claims against them

arising from the acts of the master or crew. *The Scotland* 105 *U. S.* 24. (*Overruling Thomassen v. Mark Whitwell*, 9 *Ben.* 458.)

If the ship-owner pleads the statute, a decree may be made requiring him to pay into court the limited amount for which he is liable, and distributing such amount ratably amongst the parties claiming damages. Such a proceeding would be an appropriate proceeding under the statute. *Ib.*

It is not necessary that the ship-owner should surrender and transfer the ship, in order to obtain the benefit of the law. That is only one mode of relief. He may plead his immunity, and abide a decree against him for the value of the ship and freight as found by the proofs. *Ib.*

Leave of the court is not necessary to institute proceedings for limitation of liability under the statute. *Thomassen v. Mark Whitwell*, 9 *Ben.* 458.

A ship-owner, who on the trial of the original issue contests all liability whatever, is not thereby precluded from afterwards claiming the benefit of the statute limiting his liability. But in the proceedings to obtain exemption, the decree in the main suit is conclusive and forms the basis of the pro rata share of the respective parties injured. *The Benefactor*, 103 *U. S.* 239.

On filing a petition for limited liability, the libellants, until final action shall be had thereon, should be restrained from enforcing any decree. *Ib.*

Proceedings for limitation of liability, if not instituted until after a party has obtained satisfaction of his demand, are ineffectual as to him. A return of the money should not be compelled, nor, in general, should relief be granted, except upon condition of compensating the party for costs and expenses by reason of delay in filing the petition. *Ib.*

The owner of a vessel may, before he is sued, institute appropriate proceedings to obtain the benefit of the statute limiting his liability. *Ex parte Slayton*, 105 *U. S.* 451; *The Alpena*, 8 *Fed. R.* 280.

But it seems that if such owner fails to institute proceedings until after suit has been brought by the party injured, then he must commence them in the same district as that in which such suit was brought. *The Alpena*, 8 *Fed. R.* 280.

A stay of proceedings may be ordered after decree until the owners of the offending vessel have the opportunity of filing a petition for limitation of liability. *The Maria and Elizabeth*, 11 *Fed. R.* 520.

The owners of the vessels are liable, in cases of proceedings for the limitation of their liability, to the costs of the litigation, and for the interest on the assessed value of the vessel. *The Favorite*, 12 *Fed. R.* 213; *S. C.*, 11 *Biss.* 283.

Although possession of the vessel pending the proceedings to obtain limitation of liability is not necessary; still, the district court where those proceedings are instituted has power to order the sale of the vessel when she is held under process of another court, and will exercise that power when necessary to prevent the diminution of the property by expenses and fees. *The Mendota*, 14 *Fed. R.* 358.

## RULE LV.

Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight, (after payment of costs and expenses) shall be divided pro rata amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

*See Admiralty Rule 58.*

Originally rule 56, promulgated May 6, 1872, 13 Wall. xiii.

## Practice.

The pro rata distribution under the statute (Rev. Stats. sec. 4284) when there is not sufficient to pay all claimants in full, relates to a distribution among those whose losses arise out of the same state of facts, and has no reference to other liens. *The Marie and Elizabeth*, 12 Fed. R. 627.

## RULE LVI.

In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury, (independently of the limitation of liability claimed under said act,) provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

*See Admiralty Rule 58.*

Originally rule 57, promulgated May 6, 1872, 13 Wall. xiii.

**Decisions.**

A person claiming damages cannot contest the right of the ship-owner to exemption from liability, without presenting his claim to the commissioner, as above provided ; but he may contest the jurisdiction of the court without so doing. *In re Providence & New York Steamship Co.*, 6 *Ben.* 258.

A ship-owner who on the trial of the original issue contests all liability, is not thereby precluded from afterwards claiming the benefit of the statute limiting his liability. *The Benefactor*, 103 *U. S.* 239.

When a petition for limited liability is filed after decree rendered against the vessel, the question of liability is res adjudicata, and the losing party cannot again try the case on its merits. *The Benefactor*, 103 *U. S.* 239 ; *The Maria and Elizabeth*, 12 *Fed. R.* 627.

**RULE LVII.**

The said libel or petition shall be filed and the said pro-  
 Same ; petition may be  
 filed in district where  
 vessel libeled, etc.      United States in which said ship or vessel  
 may be libeled to answer for any such embezzlement, loss, de-  
 struction, damage, or injury ; or, if the said ship or vessel be  
 not libeled, then in the district court for any district in which  
 the said owner or owners may be sued in that behalf.      If the  
 If vessel sold, proceeds  
 to represent same.      ship have already been libeled and sold, the  
 proceeds shall represent the same for the  
 purposes of these rules.

See Admiralty Rule 58.

Originally rule 58, promulgated May 6, 1872, 13 *Wall.* xiii.

**Decisions.**

The district courts sitting in admiralty have jurisdiction of cases arising under the act limiting the liability of ship-owners. *Norwich Co. v. Wright*, 13 *Wall.*, 104.

Proceedings to obtain limitation of liability may be instituted in a district where a fund or claim equitably representing the vessel is in litigation, though the petitioners reside in another district. *In re Leon-ard*, 14 *Fed. R.* 53.

**RULE LVIII.**

All the preceding rules and regulations for proceeding in  
 The four preceding cases where the owner or owners of a ship  
 rules to apply to circuit courts of the United States.  
 or vessel shall desire to claim the benefit of  
 limitation of liability provided for in the act  
 of Congress in that behalf, shall apply to the circuit courts of

the United States where such cases are or shall be pending in said courts upon appeal from the district courts.

See Admiralty Rules 54, 55, 56, 57.

Promulgated March 30, 1881, 103 U. S. xiii.

### Memorandum.

The reasons which induced the Supreme Court in adopting this rule are stated in the case of *The Benefactor*, 103 U. S. 239.

### RULE LIX.

In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against in personam, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against ; the other parties in the suit shall answer the petition ; the claimant of such vessel or such new party shall answer the libel ; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court ; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases, from parties brought in under process issued on the prayer of a libellant.

*In collision cases, third parties may be brought in by petition of party already sued.*

*Answer of such other parties, etc.*

*Security for costs, damages, etc.*

See Admiralty Rules 5, 8, 9, 11, 15, 26, 27, 32, 35.

Promulgated October Term, 1882.

**R U L E S**  
**OF**  
**T H E C O U R T O F C L A I M S . \***

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**RULE I.—*Attorneys and Counsel.***

(1.) Suits may be commenced by the claimant in person,   
Suits, by whom com- or through his attorney in fact, or an at-  
menced. Power of at- torney to be filed. torney of this court. If the claimant is rep-  
resented by an attorney in fact, the power must be filed with  
the clerk, and its execution must be proved or acknowledged  
before an officer authorized to take acknowledgments of deeds.

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\*In suits brought in Court of Claims, Attorney General to transmit petition in cer-  
tain cases, etc., to Departments, officers, etc.—To be furnished with information; what  
statement to contain. One statement may be used in other cases of same class. Rev.  
Stats. sec. 188.

Appeals from judgment of Court of Claims to Supreme Court regulated. Rev. Stats.  
sec. 707.

Time and manner of taking appeals from Court of Claims to Sapreme Court. Rev.  
Stats. sec. 708.

The Court of Claims shall consist of one Chief Justice, and four Judges, appointed by  
the President by and with the advice and consent of the Senate, and to receive an  
annual salary of four thousand five hundred dollars. Rev. Stats. sec. 1049.

The Court of Claims shall have a seal with such device as it may ordcr. Rev. Stats.  
sec. 1059.

Court rooms, etc., to be provided by Speaker of the House of Representatatives, etc.  
Rev. Stats. sec. 1051.

The conrt shall hold one annual session at the City of Washington, beginning on  
the first Monday of December. Rev. Stats. sec. 1052.

Three judges shall constitute a quorum, and the concurrence if three shall be nec-  
essary to the decision of any cause. Act June 23, 1874. 18 Stat. L. 252. (See Rev.  
Stats. sec. 1052.)

Conrt to appoint a chief clerk, an assistant clcrk, if deemed necessary, a bailiff and  
a messenger. Rev. Stats. sec. 1053.

Salaries of clerks, bailiff and messenger. Rev. State. sec. 1054.

Chief clerk shall give bond in form and amount to be approved by the conrt. Rev.  
Stats. sec. 1055.

Chief clerk may disburse, under direction of the court, the contingent fund ap-  
propriated to its use. Rev. Stats. 1056.

Reports to Congress, copies for Departments, etc. Rev. Stats. sec. 1057.

(2.) Any person of good moral character, who has been admitted to practice in the Supreme Court of the United States, or in the highest court of the District of Columbia, or in the highest court of any State or Territory, may be admitted, on motion

Admission of attorneys  
to the bar of this court,  
in open court, and in  
vacation.

Members of Congress not to practice in the court. Rev. Stats. sec. 1058.

Jurisdiction ;—Of claims founded on statutes or contracts, or referred by Congress ;—Of set-offs and counter claims of the United States ;—Of relief to disbursing officers for loss, etc. ;—Of claims for captured and abandoned property ;—Not to extend to destruction of property by Army, etc., in suppression of rebellion. Rev. Stats. sec. 1059.

Private claims in Congress when transmitted to Court of Claims. Rev. Stats. sec. 1060.

Judgment for set-off, or counter-claim, how enforced. Rev. Stats. sec. 1061.

Decree on account of paymasters, etc., how allowed and credited. Rev. Stats. sec. 1062.

Claims referred by Departments, how transmitted and what to contain. Rev. Stats. sec. 1063.

Procedure in cases transmitted by Departments to be same as in other cases. Rev. Stats. sec. 1064.

Judgments in cases transmitted by Departments, how paid. Rev. Stats. sec. 1065.

Claims growing out of treaties not cognizable in Court of Claims. Rev. Stats. sec. 1066.

Claims not to be prosecuted by parties having suits in other courts respecting same against persons acting for the United States. Rev. Stats. sec. 1067.

Citizens or subjects of foreign governments affording similar privileges may sue in the Court of Claims. Rev. Stats. sec. 1068.

Proceedings must be commenced in Court of Claims within six years after claim accrued, except in cases of disability enumerated. Rev. Stats. sec. 1069.

Court may establish rules of practice, punish contempts, etc. Rev. Stats. sec. 1070.

Judges and clerks of the court may administer oaths and affirmations, take acknowledgments, etc. Rev. Stats. sec. 1071.

Petition of claimant to set forth matters enumerated, and be verified. Rev. Stats. sec. 1072.

Petition to be dismissed, if issue found against claimant as to allegiance, etc. Rev. Stats. sec. 1073.

Burden of proof and evidence as to loyalty to be upon claimant. Rev. Stats. sec. 1074.

Court shall have power to appoint commissioners to take testimony. Rev. Stats. sec. 1075.

Power of court to call upon Departments for information. Rev. Stats. sec. 1076.

When claimant does not show ground for relief, court may not authorize testimony to be taken. Rev. Stats. sec. 1077.

Witnesses not excluded on account of color. Rev. Stats. sec. 1088.

Parties and persons interested excluded as witnesses. Rev. Stats. sec. 1079.

Court may order examination of claimant, at instance of attorney appearing in behalf of the government. Rev. Stats. sec. 1080.

Testimony to be taken where deponent resides. Rev. Stats. sec. 1081.

Witnesses, how compelled to attend before commissioners. Rev. Stats. sec. 1082.

Cross-examination to be allowed to the government. Rev. Stats. sec. 1083.

Commissioner to administer oath or affirmation to witnesses. Rev. Stats. sec. 1084.

Fees of commissioners, by whom to be paid. Rev. Stats. sec. 1085.

Claims to be forfeited, if claimant practices fraud, and it shall be the duty of court to make specific finding as to same. Rev. Stats. sec. 1086.

Court may grant new trial on motion of claimant. Rev. Stats. sec. 1087.

New trial may be granted on motion of the government. Rev. Stats. sec. 1088.

Judgments to be paid out of appropriations for private claims. Rev. Stats. sec. 1089.

in open court, to practice as an attorney and counselor of this court. He may also be admitted at chambers, in vacation, by any member of the court, on its being shown by his affidavit or otherwise, that he has been admitted to practice in any of the aforesaid courts, and is still entitled to practice therein.

(3.) There shall be but one attorney of record for the Only one attorney or claimant in any case at any one time; but a record allowed. Changes permitted. claimant may be permitted to change his attorney, on such conditions as the court may prescribe. A firm of attorneys will be regarded as the attorney of record.

(4.) Petitions, pleadings, and motions on the part of the

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Interest allowed if judgment in favor of claimant is appealed from, etc. Rev. Stats. sec. 1090.

No interest allowed on claims prior to judgment. Rev. Stats. sec. 1091.

Payment of judgment to be full discharge to government. Rev. Stats. sec. 1092.

Final judgment against claimant to be bar of further claim. Rev. Stats. sec. 1093.

Assignment of claims against the United States before issue of warrant for payment, void. After issue of warrant, what to recite. Rev. Stats. sec. 3477.

Contracts of Secretaries of War, Navy and Interior to be in writing, signed, etc. Rev. Stats. sec. 3744. (See Rev. Stats. secs. 512-515.)

Jurisdiction of Court of Claims not to extend to claims for destruction of property in the suppression of the rebellion. Act July 4, 1854, sec. 1, 13 Stat. L. 381.

Claims of certain loyal citizens for quartermaster's stores, how to be settled. Same Act, sec. 2.

Claims of certain loyal citizens for subsistence furnished to the Army, how to be settled. Same Act, sec. 3.

Act July 4, 1864 (three last paragraphs) extended to the counties of Berkely and Jefferson, in West Virginia. Joint Resolution, June 8, 1866, 14 Stat. L. 560.

Claims for supplies, etc., taken or used by the Union troops, or for injuries caused by them in a State, etc., declared in insurrection, or, etc., not to be settled—Tennessee and West Virginia excepted. Act Feb. 21, 1867, 14 Stat. L. 397.

Protection to officers acting for the United States during the rebellion against suits, etc. (Note.—The Statutory Provisions referred to in the body of this act may be found respectively in Rev. Stats. sec. 629, par. 12, and secs. 643, 645, 646, 934, 989.) Act July 27, 1868, sec. 1, 15 Stat. L. 243.

No action in the name of an alien to be maintained in the courts of the United States for losses sustained by reason of the rebellion, except where a corresponding right to prosecute claims against the government of such aliens is accorded to citizens of the United States. Same Act, sec. 2.

Meaning of the "captured and abandoned property act," declared.—Proviso as to judgments. Same Act, sec. 3.

Claims for steamboats impressed into service not excluded from settlement, under Act Feb. 19, 1867 (noted above.) Joint Resolution, Dec. 23, 1869, 16 Stat. L. 368. (See Joint Resolution, Mar. 3, 1871, 16 Stat. L. 600.)

Cost of printing records in Court of Claims, how to be paid for. Act Mar. 31, 1877, 18 Stat. L. 344.

Jurisdiction of Court of Claims to hear and settle outstanding claims against the District of Columbia. Act June 16, 1880, 21 Stat. L. 284. (Note.—Time extended by Act Mar. 3, 1883, ch. 95, 22 Stat. L. 469.)

Cases depending before Congress may be referred to the Court of Claims. Act Mar. 3, 1883, 22 Stat. L. 485.

claimant will be signed by the attorney of record ; pleadings and motions on the part of the United States, by the Assistant Attorney General.

(5.) Attorneys of record, or the claimant if he appear in person, will, on commencing or appearing in a suit, register with the clerk of the court a post-office address, to which all notice required by these rules or ordered by the court may be addressed.

(6.) Counsel, other than the attorney of record, may be heard on either side at the trial or in any stage of the proceedings but shall not be entitled to file pleadings, give notices, or make motions.

See *Snp. Ct. Rule 2*, and statutes and decisions noted therennder.

#### Statutory Provisions.

*Rev. Stats. sec. 1058.]* Members of either House of Congress shall not practice in the Court of Claims.

#### Decisions.

A party to a cause in the Court of Claims may change his attorney, although such attorney holds a power of attorney irrevocable on its face, and coupled with an interest in the recovery. But the attorney has a lien for his disbursements, and for any contingent fees and costs agreed upon. *Carver's case*, 7 *Ct. Cl.* 499.

Where suit has been brought in the name of a firm for property alleged to be the property of the firm, an individual partner cannot subsequently come into court and ask to have his own attorney associated on the record with the attorneys of the firm. *Belloque et al. v. U. S.*, 8 *Ct. Cl.* 493.

Under the constitution and laws of the United States, a woman cannot be admitted to practice at the bar of this court, and she is without legal capacity to take the office of attorney. *In re Belva A. Lockwood*, 9 *Ct. Cl.* 346.

A new party joined in a suit, having a distinct or adverse interest, may appear by his own attorney ; but where an executor, administrator or assignee succeeds the original claimant, he takes the suit as he finds it, and can only change the attorney on the usual terms. *Johnson's case*, 11 *Ct. Cl.* 724.

The lien usually assured to the original attorney in orders of substitution does not create a right. It merely protects a right if there be one. If a contract between an attorney and the party be void, the order does not make it valid. It merely protects valid rights if they exist. *Ib.*

A retired officer of the army cannot be an attorney for claimants in the Court of Claims, inasmuch as he is an officer of the United States

within the meaning of Rev. Stats. sec. 5498. In re R. W. Tyler, 18 Ct. Cl. 25.

### RULE II.—*The Petition.*

(1.) Suits will be commenced by petition, verified in the manner provided by law, and filed in the office of the clerk. The clerk will note the day of the filing of the petition thereon. Within twenty days thereafter, the claimant will file in the clerk's office twenty-five printed copies of such petition and note of filing.

(2.) The petition must set forth :

- a. The title of the action, with the full christian and surnames of all the claimants.
- b. A plain, concise statement of the facts and circumstances, giving place and date, free from argumentative and impertinent matter.
- c. The prayer, in which the claimant must state distinctly the amount for which he demands judgment, or the relief for which he prays.

(3.) When the claimant cannot state his case with the requisite particularity without an examination of papers in one of the Executive Departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. The court will thereupon call upon the proper Department for such information or papers as it may deem necessary; and when the same are furnished, the petition may be amended, and the amended petition shall be printed and filed, and may take the place of the original petition.

(4.) If the claimant be an executor, administrator, guardian, or other representative, appointed by a judicial tribunal, a duly-authenticated copy of the record of the appointment must be filed with the petition at the commencement of the action.

(5.) If the claim be founded upon an act of Congress, or upon a regulation of an Executive Department, the act and the section thereof upon

Appointment of execu-  
tor, &c., how proved.

ian, or other representative, appointed by a

judicial tribunal, a duly-authenticated copy

of the record of the appointment must be filed with the pe-

tition at the commencement of the action.

Acts and regulations to  
be specified.

the act and the section thereof upon

which the claimant relies must be specified, and the particular regulation of the Department must be stated in terms.

(6.) If the claim be founded upon an express contract with the United States, such contract must be set forth in the petition, and, if it be in writing, must be annexed thereto. If it be founded upon an implied contract, the circumstances upon which the claimant relies to prove a contract must be specified. If it consist of several matters or items, each must be separately stated.

(7.) If the petition be verified by the attorney at law or other agent of the claimant, a power of attorney authorizing him to make the verification must be filed with it. Agent verifying petition  
must have power of attorney.

(8.) If a claimant desire to amend his petition at any time he must set forth in his motion the specific amendments desired. If the motion be allowed, he must within twenty days thereafter file a copy of the petition, with the amendments properly incorporated therein, unless the court order otherwise. Amendment of petition.

(9.) If the claimant die pending the suit, his death may be suggested on the record, and his proper representative may, on motion, and on filing a duly-authenticated copy of the record of his appointment as executor or administrator, be admitted to prosecute the suit. Death of the claimant.

See Ct. Cl. Rules 15, 22.

#### Statutory Provisions.

*Rev. Stats. sec. 1072.]* Petitions to contain matters enumerated, and to be verified.

*Rev. Stats. sec. 1073.]* Petition to be dismissed if issue found against claimant, as to allegiance, etc.

*Rev. Stats. sec. 1077.]* If petition does not show ground for relief, testimony will not be taken.

*Rev. Stats. sec. 955.]* Proceedings on death of a party before judgment in any court of the United States.

*Rev. Stats. sec. 956.]* Same where one of several parties dies, and the cause of action survives.

#### Decisions.

The Court of Claims cannot by rule require parties to present their claims to an executive department before suing in that Court. *Clyde v. U. S.*, 13 Wall. 88; reversing S. C., 7 Ct. Cl. 262.

It is unnecessary for a claimant in the Court of Claims under the cap-

tured and abandoned property act, to prove loyalty to the Union during the late war, inasmuch as the President's proclamation of Dec. 25, 1868, grants a pardon to all participants in the rebellion. *Pargouid v. U. S.*, 13 Wall. 156; *S. C.*, 7 Ct. Cl. 280. (See Klein's case, 7 Ct. Cl. 240.) And such pardon extends to aliens domiciled in the United States during the rebellion. *Carlisle v. U. S.*, 16 Wall. 147. (See Collie's case, 9 Ct. Cl. 431.)

Where a claimant neglects to verify his petition, the defendants should move to dismiss it for irregularity ; they cannot take advantage of the omission as a jurisdictional defect. *Griffin's Case*, 13 Ct. Cl. 257.

### RULE III.—*Pleas.*

(1.) Demurrers to petitions and general traverses thereof  
When pleas must be filed. must be filed within two months after the filing of the petition ; and pleas averring special defense, set-off, or counter-claim, within one month after the claimant places his case on the notice-book.

(2.) When the Attorney-General demurs to the petition,  
Grounds of demurrer. he must set forth the grounds of the demurrer specially ; but if the ground be that the petition does not allege facts sufficient to constitute a cause of action, that objection may be stated generally. If the demurrer be sustained, the claimant may, of right, amend his petition, within such time as the court may direct ; but if he decline to amend, judgment will be rendered dismissing the petition. If the demurrer be overruled, the defendants may, of right, plead to the petition, within such time as the court may direct ; but if they decline so to plead, judgment will be rendered for the claimant according to the prayer of the petition ; or the court will order an assessment of damages, as the Attorney-General may elect.

(3.) Within one month after the filing of a set-off or  
Replication to set-off, &c. counter-claim by the defendants, the claimant must answer the same by replication under oath ; in default whereof the court may, after ten days' notice by the defendants to the claimant, order that the set-off or counter-claim be considered as admitted.

(4.) When the Attorney-General pleads, under section 1086  
Plea of fraud. of the Revised Statutes, that the claimant has practiced or attempted to practice fraud, he shall set forth the facts with sufficient particularity to enable

the claimant to answer the same in detail ; and the claimant shall, within two months after the filing of said plea, reply to the same with like particularity, under oath.

#### RULE IV.—*Motions.*

(1.) Motions will be heard in the first instance before a Judge at chambers ; but he may direct the same to be heard in open court. They must come to him through the clerk's office, and, when acted upon, will be returned there by him.

(2.) Motions must be in writing, signed by the attorney of record, and must give the title and number of the case and the term at which they are made ; and in no case shall the clerk enter the motion unless this rule be complied with.

(3.) No order will be entered by the clerk unless it be directed from the bench, or be reduced to writing and marked "Allowed" by the Chief Justice or one of the Judges.

(4.) The clerk will not file any paper unless it be properly indorsed with the title and number of the suit and the name of the attorney filing it.

When orders to be entered of record.

Papers to be indorsed before filing.

#### RULE V.—*Service of Notices.*

(1.) Parties filing petitions, pleadings and motions, except motions for calls on Departments, must at the same time leave with the clerk written notice thereof, addressed to the attorney of the adverse party with postage prepaid, and the clerk will mail the same and note the fact on the general docket. All other notices to adverse parties may be served in like manner. The clerk's entry on his docket will be *prima facie* evidence of the service. In the computation of time, the day of the service will be excluded, and the day on which a party is required to appear, or on which an act is required to be done, will be included.

#### RULE VI.—*Witnesses.*

(1.) When a petition is filed, either party may proceed to take testimony, notwithstanding that issue of fact has not been joined or that issue on demurrer may be pending.

Evidence may be taken before issue joined.

(2.) Unless the court order a witness to testify orally on Testimony to be by de-  
positions. Officers who may take depositions. the trial, the evidence of witnesses must be by deposition, taken either before a commissioner of the court, or a judge of a court of the United States, or a judge of a court of record in a State or Territory of the United States, or a commissioner appointed by a circuit court of the United States, or a notary public.

(3.) When a witness can be conveniently examined before a judge of this court, either party, at any time prior to the examination, may move for an order directing that his deposition be so taken.

(4.) If a witness, having been duly summoned, and his fees tendered him, shall fail or refuse to appear and testify before any officer authorized to take his testimony, a rule upon him will be issued by the court, on motion, to show cause why a fine should not be imposed upon him, and, if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

(5.) The fees of witnesses shall be such as are now, or may hereafter be, prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear.

(6.) The court may remand any case to the docket, and order a witness or a claimant to be produced before the court or one of the Judges thereof for examination.

See Ct. Cl. Rules 7, 8, 9, 10, 11.

#### Statutory Provisions.

*Rev. Stats. sec. 1078.]* Witnesses not excluded in Court of Claims on account of color.

*Rev. Stats. sec. 1079.]* Parties and persons interested in claims excluded as witnesses.

*Rev. Stats. sec. 1080.]* Claimant may be examined at the instance of the attorney on behalf of the government. (Note.—Parties can testify in their own behalf in cases referred by Congress or Executive Department under act Mar. 3, 1883, 22, Stat. L. 485.)

*Rev. Stats. sec. 1081.]* Testimony to be taken where witness resides.

*Rev. Stats. sec. 1082.]* How witnesses compelled to attend before commissioners.

*Rev. Stats. sec. 1083.]* Cross-examination of witnesses on behalf of the government.

*Rev. Stats. sec. 1084.]* Commissioner to administer oath or affirmation to witnesses.

**Decisions.**

Where an agent acting without authority of his principal, but in his name, does an act which the principal never ratifies, and such agent afterwards files a petition in the Court of Claims for relief, he is regarded as the principal, and is debarred from testifying in his own behalf. Stoddart's case, 4 *Ct. Cl.* 511.

Trustees of a corporation are competent witnesses for the corporation in a suit in the Court of Claims. Hebrew Congregation's case, 6 *Ct. Cl.* 241.

A surety who has guaranteed the performance of a contract as to which a breach is alleged and damages are claimed, is incompetent as a witness for the claimant. Wood's case, 10 *Ct. Cl.* 395.

Creditors of an estate cannot be witnesses in a suit prosecuted by an administrator, where whatever may be recovered will go to increase their dividend. Henegan's case, 17 *Ct. Cl.* 155.

The statute excluding parties from being witnesses in their own behalf in the Court of Claims was intended to do no more than restore in that court the common law rule excluding parties as witnesses; and hence they can testify to such matters as may be permitted under the common law rule. U. S. v. Clark, 96 *U. S.* 37.

The deposition of a witness who is not a party to the action, although interested therein, may be taken on the part of the United States to defeat a claim. Kulb v. U. S., 18 *Ct. Cl.* 40.

The right of the government to examine the claimant as a witness cannot be extended to any other person; and the claimant can be held responsible only for his own non-attendance as a witness. Macaulay's case, 11 *Ct. Cl.* 575.

The government may call as a witness before trial, the assignor of the claim in suit, or a person interested in the event, and may withhold the testimony at the trial, as it may that of a claimant. *Ib.*

It is no objection to the competency of a witness for the government in the Court of Claims that his interest is adverse to that of the claimants, and that a judgment against them may have the effect of establishing his right to the money claimed. Bradley v. U. S., 104 *U. S.* 442.

**RULE VII.—*Depositions on Written Interrogatories.***

(1.) Depositions obtained in foreign countries must be taken on written interrogatories, sent out under a special commission issued by the clerk. Depositions in foreign countries. Positions may be taken in like manner within the United States, by consent of parties, or when authorized by the court, or by a Judge in vacation. The written interrogatories must be filed in the clerk's office, and notice thereof given to the adverse party. Within fifteen days after such notice, the adverse party may file objections to any of the interrogatories, specifically stating the grounds of objection; and may either

file cross-interrogatories, or a notice that he will cross-examine the witnesses orally; which notice shall be attached to and sent out with the special commission. If he file cross-interrogatories, the other party may, within fifteen days thereafter, file objections thereto, specifically stating the grounds of objection. No objections to an interrogatory or a cross-interrogatory will be considered at the trial unless taken before the commission issues.

(2.) When a deposition is taken upon written interrogatories

Parties not to be present at taking. and written cross-interrogatories, neither the Attorney-General, nor the claimant, his agent or attorney, nor any other person, shall be present at the examination of the witness; which fact shall be certified by the officer taking the deposition; who shall, in such cases, propound the interrogatories and cross-interrogatories to the witness in their order, and reduce his answers to writing as nearly as practicable in his precise words.

See Ct. Cl. Rule 6, and statutes and decisions noted thereunder; and also Ct. Cl. Rules 8, 9, 10, 11.

#### RULE VIII.—*Depositions on Oral Examination.*

(1.) The party proposing to take depositions on oral examination shall cause fifteen days' notice to be given thereof to the other party. The notice must be in writing, and state the names of the witnesses to be examined, the day of the month, the hour, and the place of taking deposition. When the claimant proposes to take a deposition, and the witness resides more than five hundred miles from Washington, or when the defendants propose to take the deposition, and the witness resides more than five hundred miles from the claimant or his attorney, one day's further notice shall be given for every additional hundred miles.

(2.) If the claimant proposes to take a deposition in the city of Washington, three days' notice shall be sufficient; and a like notice by the defendants shall be sufficient when the claimant's attorney resides in the city of Washington.

(3.) When a deposition is taken by oral examination, each question propounded to the witness must be recorded, and his answers must be taken down, as nearly as may be, in his own words.

(4.) No general objection to any question shall be noticed by the officer ; but where an objection is made on specifically stated grounds, the officer shall record the same in direct connection with the question objected to.

(5.) When depositions are taken on notice, as provided in section 1 of this article, if both parties are present or represented at the time and place specified in the notice, either party may, after the examination of the witnesses produced under the notice, be entitled to produce and examine other witnesses ; but in order thereto one day's notice must be given to the adverse party, or his attorney, there present.

See Ct. Cl. Rule 6, and statutes and decisions noted thereunder ; and also Ct. Cl. Rules 7, 9, 10, 11.

#### RULE IX.—*General Provisions as to Depositions.*

(1.) Witnesses must be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify ; and each witness shall then state his name, his occupation, his age, if under twenty-one years, his place of residence ; whether he has any, and, if any, what interest, direct or indirect, in the claim which is the subject of inquiry ; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition, the witness shall state whether he knows of any other matter relative to the claim in question ; and if he do, he shall state it. The testimony of the witness when completed shall be read over to him, and be signed by him in the presence of the officer.

(2.) The officer should so connect the sheets of the deposition that they cannot be tampered with, and should return them sealed together. He should sign, and make the witness sign, each sheet ; and generally he should spare no pains to return to the court the exact evidence he has taken. All exhibits should be carefully marked so as to be capable of immediate identification, and, when practicable, should be attached to the deposition under seal.

(3.) The officer must state, in the caption of the deposi-

**Caption of deposition.** tion, the cause in which it was taken, the place and date of taking, the name of the witness, the party by whom called, and the names of the parties and counsel present. And in the body of the deposition must also be shown by whom the witness was examined and cross-examined.

(4.) In his return the officer must show that the witness ~~What the officer's return~~ was properly sworn or affirmed, and that ~~must shbow.~~ the answers were taken down in his presence, and read over to and signed by the witness.

(5.) The officer must inclose the commission, depositions, ~~Return of deposition.~~ and exhibits in a packet, under his seal, and direct the same to the clerk of the court at Washington, and deposit the packet in the post-office, or in an express-office, or he may transmit the same by a messenger, whose name shall be by him indorsed on the packet.

(6.) If the officer's fees be not paid at the time of taking ~~Officer's fees to be paid before opening the deposition.~~ the deposition, he should indorse on the outside of the packet the gross amount of his fees and disbursements, and inclose inside a detailed statement thereof. The packet must not be opened until the party for whom the depositions were taken deposits with the clerk the amount indorsed thereon. The clerk will then open the packet, and tax the officer's charges at the rate hereinafter provided, and immediately transmit to him the amount taxed, returning the overplus, if any, to the party. The money will be transmitted by draft or registered letter, and the clerk will retain his vouchers therefor.

(7.) The fees shall be three dollars a day for attending to ~~Fee list.~~ take the depositions, and twenty cents a folio of one hundred words for taking and returning it; but this per diem allowance is limited to one day for a deposition or series of depositions taken in the same case. Short-hand reporters, acting as special commissioners, will receive, in addition to these fees, ten cents a folio for writing out the deposition from their notes.

(8.) Any permanent commissioner charging in excess of ~~Excessive charges.~~ the prescribed fees, except under a previous written agreement with the parties, will be deemed guilty of improper and illegal conduct, and his commission will be revoked.

(9.) Objections to the notice, or the form and manner of

taking or returning the testimony, must be Objections to notice, made in writing, and filed within one month form, &c., when to be made after notice of the filing of the deposition, or they will be considered as waived.

See Ct. Cl. Rule 6, and statutes and decisions noted therunder; and also Ct. Cl. Rules 7, 8, 10, 11.

#### Statutory Provisions.

*Rev. Stats. sec. 1075.]* Court of claims have power to appoint commissioners to take testimony, prescribe their fees, and to issue commissions.

*Rev. Stats. sec. 1085.]* Fees of commissioner for taking testimony, by whom paid.

#### RULE X.—*Evidence Certified from the Departments.*

(1.) The Attorney-General may offer in evidence properly certified information and papers from any Executive Department, without calling for the same under the provisions of section 1076 of the Revised Statutes. A call for such information and papers will be made at a claimant's request, on the approval of a Judge in chambers. On the receipt of an answer to the call, the clerk will notify the claimant's counsel and the Attorney-General by post.

(2.) All information or papers furnished by an Executive Department in response to a call, or through the Attorney-General, is subject to objection by either party according to the rules of evidence at the common law; but neither party will be required to produce the originals of such papers, or to prove their execution, unless within one month after the return is filed the party objecting to such papers enter of record in the clerk's office a written denial of their genuineness.

(3.) Whenever it is charged in a petition that a contract has been made or other liability incurred through an officer or agent of the United States, other than the head of an Executive Department or the chief of a bureau, the claimant will be required to prove that such person was an officer or agent of the United States, by the certificate of the proper Executive Department, or by other legal and sufficient evidence.

(4.) Any information or papers certified from any Executive Department, and filed in any cause, may be used and applied in any other pending cause to which the same may be applicable or pertinent. To entitle such information or papers to be so used, copies thereof must be filed in such other cause before the same shall have been placed on the trial docket.

See Ct. Cl. Rule 6, and statutes and decisions noted therunder; and also Ct. Cl. Rule 7, 8, 9, 11.

#### **Statutory Provisions.**

*Rev. Stats. sec. 188.]* Attorney-General may call upon Departments for information, etc.

*Rev. Stats. sec. 1076.]* Power of the Court of Claims to call upon Departments for information.

#### **RULE XI.—*Production of Original Papers by the Claimant.***

(1.) The court may, at the instance of the Attorney-General, order any claimant, his agent or attorney, to produce in court, or before any officer authorized to take depositions, any letters, papers, deeds, documents or other writings in his possession or subject to his control, in any way relating to the claim sued upon ; and any claimant, his agent or attorney, who, after due notice, refuses to produce such letters, papers, deeds, documents, or other writings, when in his power to do so, shall be subject to attachment for contempt ; and, if he persist in such refusal, the court will direct the petition to be dismissed.

See Ct. Cl. Rule 6, and statutes and decisions noted therunder ; and also Ct. Cl. Rules 7, 8, 9, 10.

#### **RULE XII.—*Briefs and Requests for Findings of Fact.***

(1.) The claimant may at any time give notice to the Attorney-General that his proof is closed, by an entry to that effect in the notice-book in the clerk's office. If the Attorney-General shall not within two months thereafter file a request for further time to take proof, the claimant may, at any time after the expiration of that period, have the case placed on the trial list.

(2.) The clerk shall not place a case on the trial list until the claimant files in the clerk's office twenty-five printed copies of a brief stating the points of law on which he relies, with references to authorities, and twenty-five printed copies of the requests for facts required by Rule V of the "Regulations prescribed by the Supreme Court of the United States under which appeals may be taken from the Court of Claims."

(3.) Such requests must be in the following terms : "*The claimant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same, as follows.*" Following this request must be a statement, in the form of distinct numbered propositions, of the facts which the party desires to have found ; and each proposition must be so prepared, with respect to its length, subject, and phraseology, that the court may conveniently pass upon it ; and they must be so arranged as to present a concise statement, in order and logical sequence, of the whole case, as the party desires it to appear in the findings of fact. Subjoined to each proposition must be references to the pages of the record containing the evidence relied on in its support ; but no evidence must be set out. Documents which may enter into the findings of fact need not be presented in the statement, but may be referred to therein by the pages of the record.

(4.) The Attorney-General, within one month after the filing of the claimant's brief and request, must file his brief and request for findings of fact and should indicate the requests on the claimant's part to which no objection is made. Such request must be in form and substance like that required of the claimant by the next preceding section.

(5.) If the claimant neglect for two years after filing his petition, to close his proof and give notice to the Attorney-General, as required by section 1 of this article, the defendants may place the case on the trial list.

(6.) Whenever, in any case which the claimant has not put on the trial list, it shall be shown to the court that an early decision

Printed copies of  
claimant's brief and  
requests for findings  
to be filed.

Form of requests for  
findings.

Defendant's brief and  
request.

When Attorney-General  
may put case on  
the trial list.

When cases involving  
important interests to  
the Government may  
be put on trial list by  
defendants.

ion thereof is important to the interests of the Government, the case may, in the discretion of the court, be placed on the trial list by the defendants.

See Rules 1, 4, 5, Sup. Ct. Rules governing appeals from the Court of Claims, and statutes and decisions noted thereunder.

### RULE XIII.—*Trials and other Proceedings in Court.*

(1.) When the defendants' brief and request are filed the When case to be held case will be considered as ready for trial, ready for trial. and, when reached, a continuance will not be ordered, except by consent of parties, or for good cause shown.

(2.) The trial docket will be made up monthly. Cases will Trial docket. go upon it in the order in which notices of trial have been filed.

(3.) The peremptory call of the trial docket will begin on When trial docket to be called. the Tuesday after the first Monday of each month during the term.

(4.) No case will be heard for trial unless the printed pleadings, evidence, and briefs be made up in Record to be made up in book form. book form together and paged consecutively, and a copy thereof furnished to each member of the court at the hearing; and all citations from, or reference to, such pleadings, evidence, and briefs must be by the consecutive paging of such book.

(5.) When, in any case, the record shall be made up in Table of contents. book form, as required in the next preceding section, the chief clerk will make, cause to be printed, and prefix to each copy of the record so made up, a table of the contents thereof, with references to the page where each document and each piece of evidence may be found.

(6.) The law docket will be taken up on Monday of each Law docket. week during the term.

### RULE XIV.—*Printing.*

(1.) The testimony and briefs will be printed. In printing Depositions, how to be printed. the testimony, the notices and the officer's captions and certificates will be omitted; but to each deposition there must be prefixed a title in the following form: *Deposition of \_\_\_\_\_ for claimant [or defendant, as the case may be], taken at \_\_\_\_\_, on the \_\_\_\_\_*

*day of* ——, 18—; *claimant's counsel*, ——; *defendant's counsel*, ——.

(2.) Where an answer of a Department is printed as evidence, the call for the same must be printed Calls on Departments to be printed.

(3.) Before printing a return made to a call on a Department, the chief clerk will withhold from the Matter not to be printed. copy for the printer, 1st, all papers of which copies have been previously printed in the record of the case; and for this purpose he will compare the two copies, and if variations are found he will take the directions of a Judge in chambers before sending the return to the printer; 2d, all certificates of authenticity and certificates of acknowledgment; 3d, all papers which both parties agree to omit; 4th, all papers which a Judge in chambers orders to be omitted. In each case the chief clerk will make a memorandum of the omission in the copy for the printer, verified by his initials.

(4.) If the claimant objects to printing information or papers so returned, and the Attorney-General Objections to printing. requests to have the same printed, the clerk will note a memorandum of such request in the copy for the printer, with his initials attached; and when such information or papers are printed, the same will be regarded as evidence offered on the part of the defense. All information and papers transmitted from a Department in reply to a claimant's call, and not thus objected to by him within ten days after return of the call, will be regarded as evidence offered by the claimant.

(5.) The printed papers required by these rules must be in long primer type and in royal octavo Type and size of page. pages, and the style and number of the case must be prefixed to all printed papers and to records of evidence.

(6.) No deposition, return, or record on file shall be taken from the custody of the clerk by a claimant Depositions, &c., not to be taken from clerk's office. or his attorney, but either may attend at the clerk's office, and prepare his evidence for the press in the form and manner before prescribed. When the evidence is complete and ready for the printer, the chief clerk will have it printed at the Public Printing Office.

**RULE XV.—*Limitation.***

(1.) If it appear on the face of the petition that the claim when petition may be first accrued more than six years before the dismissed on bar of six years. petition was filed, the claimant must aver therein the existence and period of duration of some disability, recognized by law, which prevented his filing his petition within that time; in default whereof, it will be considered that no such disability existed, and the petition may be dismissed on motion.

(2.) If the claimant, in avoidance of the bar of limitation, when petition may be aver in his petition the existence and duration of any such disability, and it thereby appears that, after the disability ended, more than three years had elapsed before the petition was filed, the petition may be dismissed on motion.

(3.) If upon the face of the petition it does not appear if petition does not when the claim first accrued, the court may require the claimant to make the petition definite and certain in that regard, and in default thereof may dismiss the suit.

(4.) Averments in regard to the time when a claim first accrued, or in regard to an alleged disability of the claimant, will be held to be put in issue by the defendant's general traverse.

See Ct. Cl. Rule 2.

**Statutory Provisions.**

*Rev. Stats. sec. 1069.]* Claims barred unless petition filed in Court of Claims, or transmitted to it by Senate or House of Representatives within six years after claim first accrued, except in cases enumerated.

**Decisions.**

The limitation prescribed by statute within which a suit must be brought in the Court of Claims does not begin to run if there be no person in existence when the claim accrues who is qualified to sue upon it. Therefore, where a contractor dies before the claim accrues, and administration on his estate does not take place until afterward, the statute will not begin to run until an administrator is appointed. Fulenweider's Case, 9 Ct. Cl. 403.

Where a disbursing officer is seeking relief for lost funds, the statute of limitations does not run against him from the time of the loss, but from the time he is officially held responsible for the loss. Clark's Case, 11 Ct. Cl. 698; Scott v. U. S., 18 Id. 1.

When it appears by the record of a case that more than six years had elapsed between the time the claim accrued and the filing of the petition, and nothing appears by the record to take the case out of the statute, the petition will be dismissed. *Mrs. Campbell's Case*, 13 *Ct. Cl.* 108.

It is not necessary that the statute of limitations be pleaded, for the court is bound to take notice of it, and will enquire whether it appears from the face of the petition, or by evidence, that the period limited by law had expired before the petition was filed. *Kendall v. U. S.*, 14 *Ct. Cl.* 122.

If the statute of limitations began to run during the lifetime of the claimant, its operation will not be arrested by his death. *Sierra v. U. S.*, 9 *Ct. Cl.* 224.

The petition may be amended, and the claimant may present an amended petition, although more than six years have elapsed since the claim accrued. *Griffin v. U. S.*, 13 *Ct. Cl.* 257; *Devlin v. U. S.*, 12 *Id.* 266.

The limitation prescribed by statute within which suits must be brought in the Court of Claims does not bar claims referred by the head of an executive department, provided they were presented for settlement at the proper department within six years after they first accrued. *U. S. v. Lippitt*, 100 *U. S.* 663; *Green v. U. S.*, 18 *Ct. Cl.* 93.

In computing the six years' period of limitation, the time when the claimant was unable to sue by reason of participation in or aid to the rebellion must be included. *Kendall v. U. S.*, 107 *U. S.* 123.

The petition in the Court of Claims is bad on demurrer when it appears therefrom that the claimant's right of action against the United States is barred by the lapse of time. *Ib.*

Acknowledgments and promises by executive officers of the government do not bind the United States where they are not made under express or implied authority of Congress. Such acknowledgments and promises do not prevent the operation of the statute of limitations applicable to cases in the Court of Claims. *Leonard v. U. S.*, 18 *Ct. Cl.* 382.

The statute of limitations by its express terms, does not run against claims accrued after insanity, but it does run against all claims previously accrued. *Ib.*

#### RULE XVI.—*Discontinuance.*

Where fraud or set-off is pleaded, the claimant shall not, without leave of the court, discontinue his suit. In other cases he may do so, either in open court, or, with the approval of a Judge, in vacation.

#### RULE XVII.—*New Trial.*

- (1.) A new trial will not be granted where, upon the whole

New trial, when not to case, justice has been done between the  
be granted. parties and the judgment is substantially  
right, although there may have been some mistakes com-  
mitted at the trial.

(2.) A motion by a claimant for a new trial may be founded  
Grounds of motion by upon one or more of the following grounds :  
claimant for new trial. 1st, Error of fact ; 2d, Error of law ; and  
3d, Newly-discovered evidence. It must be made at the term  
in which the judgment is rendered, and before the commence-  
ment of the long vacation.

(3.) A motion founded upon an error of fact must specify  
Motion founded on er- with minuteness the fact or facts which are  
ror of fact, what to regarded as erroneously found or erroneously  
specify. omitted to be found by the court, with full reference to the  
evidence which is relied on to support the motion.

(4.) A motion founded upon error of law must specify with  
Motion founded on er- like minuteness the points upon which the  
ror of law, what to court is supposed to have erred, with refer-  
specify. ences to the authorities relied upon to support the motion.

(5.) A motion upon the ground of newly-discovered evi-  
Motion founded on er- dence will not be entertained unless it ap-  
newly-discovered evi- pear that the newly-discovered evidence  
dence. came to the knowledge of the claimant or his attorney after  
the trial and before the motion was made ; that it was not for  
want of due diligence that it did not sooner come to his  
knowledge ; that it is so material that it would probably pro-  
duce a different judgment if the new trial were granted ; and  
that it is not cumulative. Such motion must be accompanied  
by the affidavit of the claimant or his attorney of record, set-  
ting forth—

- a. The facts in detail which the claimant expects to be able to prove, and whether the same are to be proved by witnesses or by documentary evidence.
- b. The name, occupation, and residence of each and every witness whom it is proposed to call to prove said facts.
- c. That the said facts were unknown to either the claimant or his attorney of record, and, if other counsel was employed at the trial, were unknown to such counsel, until after the close of the trial.
- d. The reasons why the claimant and his attorney of record and his said counsel could not have discovered

said evidence before the trial, if due diligence had been used.

(6.) If the court desires to hear argument upon a motion by a claimant for a new trial, the motion will be ordered to the law docket; otherwise decision will be announced from the bench without hearing.

#### Statutory Provisions.

*Rev. Stats., sec. 1087.]* When new trial may be granted on motion of claimant.

*Rev. Stats., sec. 1088.]* When new trial may be granted on motion of government.

#### Decisions.

A claimant has no right to demand a new trial for a mistake in the findings of fact; but the error will be corrected as long as the proceedings are under the control of the court. *Calhoun v. U. S.*, 14 Ct. Cl. 193; *Neal v. U. S.*, *Id.* 47.

A new trial will not be granted on the ground of newly-discovered evidence, if, by the use of due diligence such evidence might have been discovered in time for the first trial. *Garrison v. U. S.*, 2 Ct. Cl. 382; *Armstrong v. U. S.*, 6 *Id.* 226; *Dreson v. U. S.*, *Id.* 227; *Bramhall v. U. S.*, *Id.* 238.

A new trial will not be granted on newly-discovered evidence, unless it appears that it will produce a different result. *Bramhall v. U. S.*, 6 Ct. Cl. 238; *Garrison v. U. S.*, 2 *Id.* 382.

In what cases new trials will be granted on motion of the government based upon newly-discovered evidence. *Ford v. U. S.*, 18 Ct. Cl. 62.

A new trial will not be granted when the motion therefor indicates that the party making it desires only to reargue the whole case upon the facts and law exactly as they were presented at the trial, without any indication that he has any thing new to offer. *Roche v. Dist. Col.*, 18 Ct. Cl. 289; *Power v. U. S.*, *Id.* 493.

#### RULE XVIII.—*Appeals.*

(1.) Application for appeal to the Supreme Court of the United States from any judgment or decree of this court must be in writing, and signed by the claimant or his attorney of record, if the appeal be on his behalf; or, if taken by the United States, it must be signed by the Attorney-General or his Assistant.

(2.) Such application, if made when the court is not in ses-

Application for appeals; how made.

To be filed in clerk's sion, must be filed with the clerk, and the office, when. date of filing the same must be indorsed upon it and noted upon the general docket.

See Rules 1, 3, 4, 5, of Sup. Ct. Rules governing Appeals from Court of Claims, and statutes and decisions noted thereunder.

#### Statutory Provisions.

*Rev. Stats. sec. 707.]* In what cases appeals may be taken to the Supreme Court.

*Rev. Stats. sec. 708.]* Time and manner of taking appeals.

#### RULE XIX.—*Clerk's Office.*

(1.) During term time the clerk's office must be kept open every day, except Sundays and holidays, from Hours of clerk's office. 9½ A. M. to 4 P. M., or to such later hours as the court may be in session or in conference. During the Christmas holidays, the office may be closed at 1 P. M., and in vacation at 3 P. M.

(2.) When the court is in session, both the chief clerk and Attendance of clerks. the assistant clerk will be at the office during office hours. In vacation they may arrange their hours to suit each other and the public business.

(3.) The chief clerk will have charge of the journal of the Duties of chief clerk. court, of the law and trial dockets, of the printing, and of the preparation of the tables of contents of the records of each case ; and he will also prepare the annual return to Congress.

(4.) The assistant clerk will attend to office business, and Duties of assistant clerk. will have charge of the general docket, the notice book, and the giving of notices under these rules.

(5.) In the absence of the chief or the assistant clerk, his Provision for absence. duties will be temporarily performed by the other.

(6.) Any one wishing to see any papers on file in the clerk's Papers on file, how obtained for examination by parties. office will apply therefor to the chief or assistant clerk, who will take them from their place of deposit, and return them thereto when done with ; and no such papers can be taken out of the clerk's office, except by authority of the court, or of one of the members thereof.

**RULE XX.—*Withdrawal of Papers.***

Papers shall not be withdrawn from the files except on motion for good cause shown, and upon such terms as the court or a judge may order. Withdrawal of papers.

**RULE XXI.—*Extension of Time.***

The time named in these rules for the doing of any act may be extended on motion for good cause shown. Extension of time.

**RULE XXII.—*Departmental and Congressional Cases.***

(1.) Cases involving controverted questions of fact or law in any claim or matter, transmitted to the court under the provisions of section 2 of the act of March 3, 1883, entitled "An

Cases transmitted by  
Departments to be sub-  
ject to same rules as  
other cases.

Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the government," shall be proceeded with in like manner, and subject to the same rules, so far as applicable, as other cases in the court under its general jurisdiction, except as herein provided.

(2.) When a case is so transmitted the clerk shall examine the papers and send notice thereof by mail to every person, whose post-office address is given, who appears therefrom to be directly interested therein, and to the Attorney-General, noting the fact on the records, and specifying the names of the parties notified, and the date of notice.

(3.) Within two months after mailing of such notices, or within such further time as the court may allow, any person directly interested in the case may appear as a party therein, by filing his petition, under oath, setting forth concisely and specifically his interest and claim.

(4.) Any person claiming to be indirectly interested in any question involved in such case may, by leave of court, be permitted to appear and be heard on the one side or the other, as his interest may require, upon filing a petition, under oath, setting forth specifically and

Persons directly inter-  
ested to be notified by  
clerk.

To file petition within  
two months.

Persons indirectly in-  
terested may appear  
and be heard.

concisely how he claims to be so interested, and submitting the questions raised to the decision of the court.

(5.) If no claimant, directly or indirectly interested, appears <sup>If no person interested</sup> and files his petition within said two months, <sup>appears the Ass't Att'y Gen. may set case down</sup> the Attorney-General, or Assistant Attorney-for trial. <sup>General charged with defending the Government</sup> in this court, may set the case down for trial upon such evidence as he may submit.

(6.) When a case is transmitted to the court by either <sup>In cases transmitted from Congress, clerk to send notices to parties.</sup> House of Congress, or a committee thereof, under the first section of said act, involving the investigation and determination of facts in any claim or matter, the clerk shall examine the papers and send notice by mail to every person, whose post-office address is given, who appears therefrom to be directly interested therein, and to the Attorney-General, noting the fact on the record and specifying the names of the parties notified and the dates thereof.

(7.) Within two months after the mailing of such notices, <sup>Persons interested may appear as parties by filing petitions.</sup> or within such further time as the court may allow, any person directly interested in the case may appear as a party therein, by filing his petition, under oath, setting forth concisely and specifically his claim <sup>Cases to be proceeded with like other cases and under the same rules.</sup> and interest. Thereafter the case shall be proceeded with, in like manner, and subject to the same rules, so far as applicable, as other cases in the court under its general jurisdiction.

#### Statutory Provisions.

*Act Mar. 3, 1883, ch. 116, 22 Stat. L. 485.]* Claims pending before either House of Congress, or committees, or before Executive Departments, may be referred to Court of Claims for examination and report.

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